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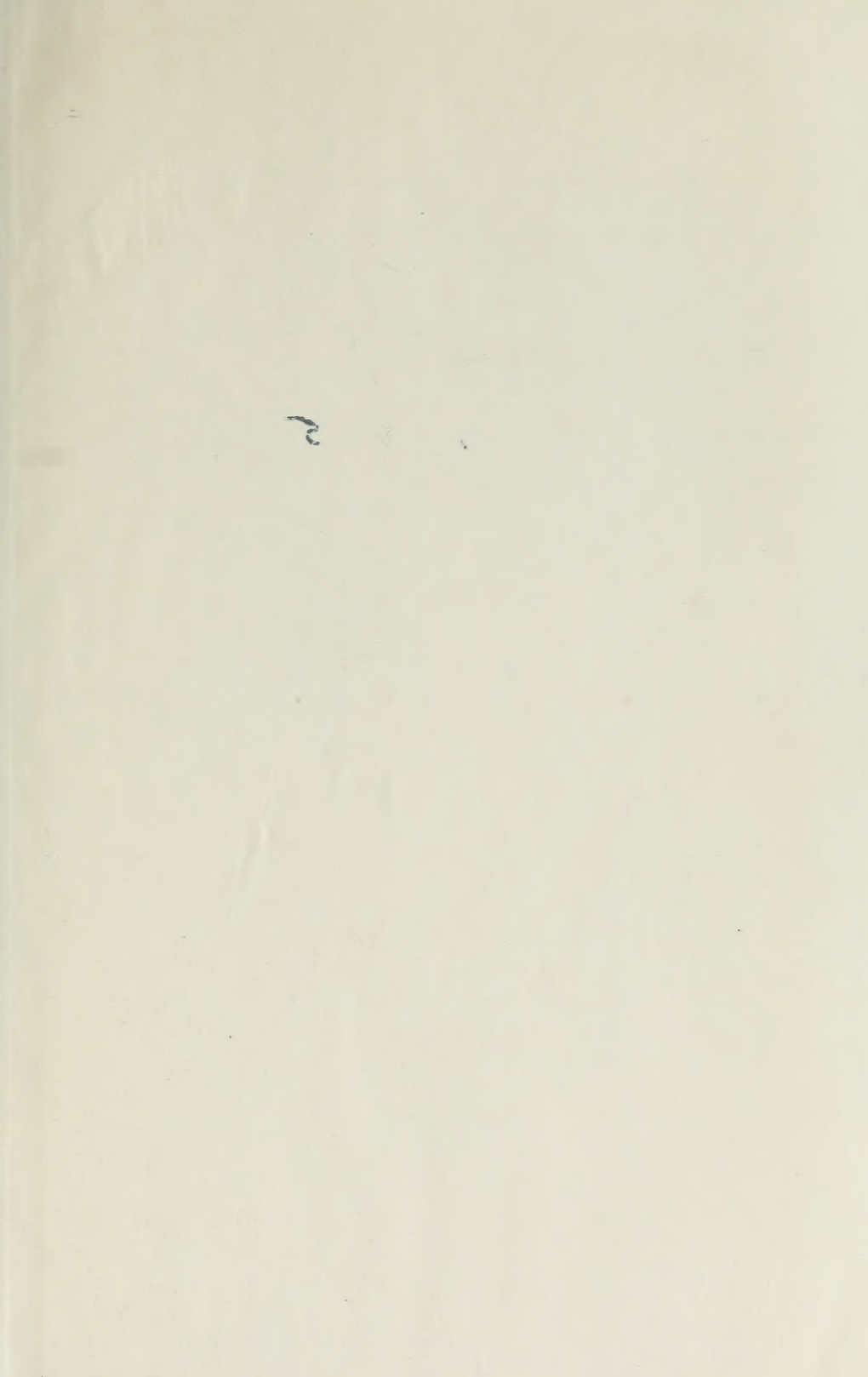
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1294

No. 3696

1295

United States  
1 1295  
Circuit Court of Appeals

For the Ninth Circuit.

CHANG SIM and CHANG YET,

Appellants,

vs.

EDWARD WHITE, as Commissioner of Immigra-  
tion for the Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
First Division.

FILED

AUG 12 1921

F. D. MONCKTON,  
CLERK.





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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CHANG SIM and CHANG YET,  
Appellants,  
vs.

EDWARD WHITE, as Commissioner of Immigra-  
tion for the Port of San Francisco,  
Appellee.

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**Transcript of Record.**

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Upon Appeal from the Southern Division of the  
United States District Court for the  
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First Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## **Names and Addresses of Attorneys of Record.**

For Petitioner and Appellant:

GEO. A. MCGOWAN, Esq., San Francisco,  
Calif.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Fran-  
cisco, Calif.

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In the Southern Division of the District Court of  
the United States, in and for the Northern  
District of California, First Division.

#16,859.

In the Matter of CHANG SIM and CHANG YET  
(4—22 “Korea Maru,” July 22, 1919; 12—15  
“Nanking,” Nov. 30, 1919), on Habeas Cor-  
pus.

### **Praeipice for Transcript on Appeal.**

To the Clerk of Said Court:

Sir: Please make transcript of appeal in the  
above-entitled case, to be composed of the following  
papers, to wit:

1. Petition for writ.
2. Order to show cause.
3. Demurrer.
4. Minute order introducing Immigration Record  
at the hearing on demurrer.
5. Judgment and order denying petition.
6. Notice of appeal.
7. Petition for appeal.
8. Assignment of errors.

9. Order allowing appeal.
10. Citation on appeal.
11. Stipulation and order respecting Immigration Record.
12. Clerk's certificate.

GEO. A. MCGOWAN,  
Attorney for Petitioners.

[Endorsed]: Filed Jun. 6, 1921. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [1\*]

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In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. (16,859).

In the Matter of the Application of CHANG SIM, CHANG YET (4—22 ex. SS. "Korea," July 22, 1919; 12—15 ex SS. "Nanking," November 30, 1919), on Habeas Corpus.

**Petition for Writ of Habeas Corpus.**

To the Honorable MAURICE T. DOOLING,  
United States District Judge in and for the  
Northern District of California.

It is respectfully shown in the petition of the undersigned, that Chang Sim and Chang Yet, hereinafter in this petition referred to as the detained, are unlawfully, imprisoned, detained, confined and restrained of their liberty by Edward White, Commissioner of Immigration for the Port of San

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\*Page-number appearing at foot of page of original certified Transcript of Record.



Francisco, at the United States Immigration Station at Angel Island, County of Marin, State and Northern District of California, Southern Division thereof; that the said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner of Immigration that the said detained are Chinese persons and are aliens, and not subject to or entitled to enter the United States under the terms and provisions of the Act of Congress of May 6, 1882; July 5, 1884; November 3, 1893; and April 29, 1902, as amended and added to by the Act of April 7, 1904 (The Deficiency Act), which [2] said acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts; and that he, the said Commissioner of Immigration intends to deport the said detained away from and out of the United States to the Republic of China.

That the said commissioner claims that the said detained Chang Sim arrived at the Port of San Francisco, on or about the 22d day of July, 1919, on the SS. "Korea Maru," and thereupon made application to enter the United States as a citizen thereof, and the said detained Chang Yet, arrived at the port of San Francisco on or about the 30th day of November, 1919, on the SS. "Nanking," and thereupon made application to enter the United States as a citizen thereof; that the two said detained are the foreign born sons of Chang Wai Tong, who is a citizen of the United States of America, and whose status as such was so conceded in the ex-

ecutive proceedings in this petition referred to; and the said commissioner further claims that after due and proper examination and investigation of the claims of the two said detained, and during the pendency of the first thereof that said detained was released upon parole or bond during a considerable portion of the time, and after his return into the custody of the said commissioner and upon the completion of the hearing before the immigration authorities, the said detained were denied admission into the United States as the sons of a citizen of the United States, said denial being based upon a disbelief in the existence of the relationship of father and son as claimed upon behalf of each of the said detained; that an appeal was perfected from said excluding decision and that the excluding decision was affirmed upon appeal to the Secretary of Labor. That it is claimed by the said commissioner that in all of the proceedings had herein the detained was accorded a full [3] and fair hearing; that the action of the Board of Special Inquiry and of the Secretary of Labor was taken and made by them in the proper exercise of the discretion committed to them by the statute in such cases made and provided, and in accordance with the regulations promulgated under the authority contained in said statutes, all as more fully appears from the record of the hearing had before the said board and before the Secretary of Labor at Washington, which said record is now on file in the office of the said Secretary of Labor in Washington.

But, on the contrary, your petitioner alleges, upon his information and belief, that the hearing and proceedings had herein and the action of the said Board of Special Inquiry, and the action of the said Secretary of Labor, was and is in excess of the authority committed to them by the said statutes and the rules and regulations promulgated thereunder, and that the denial of the application of the detained to enter the United States as the sons of a citizen thereof, was and is an abuse of the discretion committed to them by the said statutes, and was done and arrived at by denying the said detained the full and fair hearing to which they were entitled under the said statutes in each of the following particulars:

First: Your petitioner alleges upon his information and belief that the evidence presented before the board and the Secretary upon the application of the detained to enter the United States, which said evidence is now hereby referred to with the said force and effect as if set forth in full herein, was of such a conclusive kind and character establishing the citizenship of the father of the detained, as a citizen of the United States, and the existence of the relationship of father and sons between the father and the detained, and hence [4] showing the detained to be the sons of a citizen of the United States, and was of such legal weight and sufficiency that it was an abuse of discretion on the part of the said board and the said Secretary to deny the detained the right of admission into the United States and that in refusing to be guided thereby and in de-



ciding adversely thereto, the detained were deprived of the full and fair hearing and consideration of their cases to which they were entitled under the said statutes. Your petitioner further alleges upon his information and belief that the said adverse action of the said board and the said Secretary was influenced against the said detained and against their witnesses because they were of the Chinese race.

That your petitioner has not in his possession any part or parts of the said proceedings had before the said Special Board of Inquiry and the said Secretary of Labor, for the reason that your petitioner has just received telegraphic advice of the dismissal of the said appeal, and the copy of the said records formerly in the possession of the attorney for the said detained, is now in the mails en route from Washington, D. C., to San Francisco; and it is for said reason impossible for your petitioner to annex hereto any part or parts of said immigration records; but your petitioner alleges his willingness to incorporate, and have considered as part and parcel of his petition, the said immigration record when the same shall have been received from the Secretary of Labor, at Washington, and shall have it presented to this Court at the hearing to be had hereon.

That it is the intention of the said commissioner to deport the said detained Chang Sim out of the United States and away from the land of which he is a citizen by the SS. "Persia Maru," sailing from the port of San Francisco upon the 26th day

of May, 1920, and the said detained Chang Yet out of the United States [5] and away from the land of which he is a citizen by the SS. "China" sailing from the port of San Francisco upon the 22d day of June, 1920, and unless this Court intervenes to prevent said deportation the said detained will be deprived of residence within the land of their citizenship.

That the said detained are in detention as aforesaid, and for said reason are unable to verify this petition upon their own behalf, and for said reason said petition is verified by your petitioner, but for and as the act of the said detained.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner, commanding and directing him to hold the bodies of the said detained within the jurisdiction of this court, and to present the bodies of the detained before this court at a time and place to be specified in said order, together with the time and cause of their detention, so that the same may be inquired into to the end that the said detained may be restored to their liberty and go hence without day.

Dated, San Francisco, California, May 25th, 1920.

LEE YEW NAM.

GEO. A. McGOWAN,

Attorney for Petitioner,

Bank of Italy Building,

San Francisco, California. [6]

United States of America,  
State and Northern District of California,  
City and County of San Francisco,—ss.

The undersigned, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that the same has been read and explained to him and he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

LEE YEW NAM.

Subscribed and sworn to before me this 25th day of May, 1920.

[Seal]                      THOMAS S. BURNES,  
Notary Public, in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed May 25, 1920. W. B. Maling,  
Clerk. By C. M. Taylor, Deputy Clerk. [7]

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In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

(No. 16,859.)

In the Matter of the Application of CHANG SIM, CHANG YET (4—22 ex. SS. "Korea," July 22, 1919; 12—15 ex SS. "Nanking," November 30, 1919), on Habeas Corpus.



**Order to Show Cause.**

Good cause appearing therefor, and upon reading the verified petition for a writ of habeas corpus on file herein,—

IT IS HEREBY ORDERED that Edward White, Commissioner of Immigration for the port of San Francisco, appear before this Court on the 29th day of May, 1920, at the hour of 10 A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued as prayed for herein, and that a copy of this order be served upon the said commissioner and a copy of the petition herein be served upon the United States District Attorney for this District.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration as aforesaid, or whoever acting under the orders of the said commissioner or the Secretary of Labor, shall have the custody of the said Chang Sim and Chang Yet, are hereby ordered and directed to retain the said Chang Sim and Chang Yet within the custody of the said Commissioner of Immigration and within the jurisdiction of this Court until its further order herein, and herein fail ye not.

M. T. DOOLING,

United States District Judge.

Dated, San Francisco, California, May 26, 1920.

**Return on Service of Writ.**

United States of America,  
Nor. District of Calif.,—ss.

I hereby certify and return that I served an order to show cause on the therein named Edward White, Commissioner of Immigration, by handing to and leaving a true and correct copy thereof with Edward White, Comr. of Immigration, personally, at San Francisco, in said District, on the 26th day of May, A. D., 1920.

J. B. HOLOHAN,  
U. S. Marshal.  
By H. Maguire,  
Deputy.

[Endorsed]: Filed May 26, 1920. W. B. Maling,  
Clerk. By C. M. Taylor, Deputy Clerk. [9]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,859.

CHANG SIM and CHANG YET,

Plaintiffs,

vs.

EDWARD WHITE, U. S. Commissioner of Immigration, etc.,

Respondent.

**Demurrer to Petition for Writ of Habeas Corpus.**

Now comes the respondent, Edward White, Commissioner of Immigration, at the port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicants are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

ANNETTE ABBOTT ADAMS,  
United States Attorney,  
BEN F. GEIS,  
Asst. United States Attorney,  
Attorneys for Respondent.

[Endorsed]: Filed June 12, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[10]



At a stated term of the District Court of the United States for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Saturday, the twelfth day of June, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable MAURICE T. DOOLING, Judge.

No. 16,859.

In the Matter of CHANG SIM and CHANG YET  
on Habeas Corpus.

**Order Re Filing of Immigration Records.**

This matter came on regularly this day for hearing on order to show cause, etc. Geo. A. McGowan, Esq., was present on behalf of petitioner and detained. B. F. Geis, Esq., Asst. U. S. Atty., was present on behalf of respondent and presented demurrer to petitioner, and all parties consenting thereto, it is ordered that the Immigration Records be filed as Respondent's Exhibits "A," "B" and "C," and that the same be considered as part of original petition. On motion of Mr. McGowan, and Mr. Geis consenting thereto, the Court ordered that this matter be continued to June 19, 1920, for hearing on demurrer. [11]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,859.

In the Matter of CHANG SIM and CHANG YET  
on Habeas Corpus.

GEORGE A. McGOWAN, Esq., Attorney for Petitioner.

FRANK M. SILVA, Esq., United States Attorney,  
and BEN. F. GEIS, Esq., Assistant United States Attorney, Attorneys for Respondent.

**(Order) on Demurrer to Petition for a Writ of Habeas Corpus.**

The demurrer to the petition for a writ of habeas corpus herein is sustained, and the said petition is denied.

October 21st, 1920.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Oct. 21, 1920. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [12]

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In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 16,859.

In the Matter of CHANG SIM and CHANG YET  
on Habeas Corpus.

**Notice on Appeal.**

To the Clerk of the Above-entitled Court and to the  
Hon. FRANK SILVA, United States Attorney  
for the Northern District of California:

You and each of you will please take notice that  
Chang Sim and Chang Yet, the petitioners and the  
detained above named, do hereby appeal to the Cir-  
cuit Court of Appeals of the United States for the  
Ninth Circuit thereof, from the order and judgment  
made and entered herein on the 21st day of October,  
A. D. 1920, sustaining the demurrer to and in deny-  
ing the petition for a writ of habeas corpus filed  
herein.

Dated at San Francisco, California, November  
29th, 1920.

GEO. A. McGOWAN,  
Attorney for the Petitioners and Appellants Here-  
in. [13]

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In the Southern Division of the United States Dis-  
trict Court in and for the Northern District of  
California, First Division.

No. 16,859.

In the Matter of CHANG SIM and CHANG YET  
on Habeas Corpus.

**Petition for Appeal.**

Now comes Chang Sim and Chang Yet, the peti-  
tioners, the detained and the appellants herein, and  
say:

That on the 21st day of October, 1920, the above-entitled court made and entered its order denying the petition for a writ of habeas corpus, as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellants herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, these appellants pray that an appeal may be granted in their behalf to the Circuit Court of Appeals of the United States, for the Ninth Circuit thereof, for the correction of the errors so complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals, for the Ninth Circuit thereof; and further, that the said detained be admitted to bail during the pendency of the appeal herein, upon giving a bond before a Commissioner of this Court, in the sum of one thousand dollars conditioned that he will return and surrender himself in execution of whatever judgment may be finally entered herein.

Dated, at San Francisco, California, November 29th, 1920.

GEO. A. MCGOWAN,  
Attorney for the Petitioners and Appellants Herein,  
[14]



In the Southern Division of the United States District Court in and for the Northern District of the State of California, First Division.

No. 16,859.

In the Matter of CHANG SIM and CHANG YET,  
on Habeas Corpus.

**Assignment of Errors.**

Comes now Chang Sim and Chang Yet, by their attorney, Geo. A. McGowan, Esquire, in connection with their petition for an appeal herein, assign the following errors which they aver occurred upon the trial or hearing of the above-entitled cause, and upon which they will rely, upon appeal to the Circuit Court of Appeals for the Ninth Circuit, to wit:

First. That the Court erred in denying the petition for a writ of habeas corpus herein.

Second. That the Court erred in holding that it has no jurisdiction to issue a writ of habeas corpus, as prayed for in the petition herein.

Third. That the Court erred in sustaining the demurrer and in denying the petition of habeas corpus herein and remanding the petitioners to the custody of the immigration authorities for deportation.

Fourth. That the Court erred in holding that the allegations contained in the petition herein for a writ of habeas corpus and the facts presented upon the issue made and joined herein were insuffi-

cient in law to justify the discharge of the petitioners from custody as prayed for in said petition.

[15]

Fifth. That the judgment made and entered herein is contrary to law.

Sixth. That the judgment made and entered herein is not supported by the evidence.

Seventh. That the judgment made and entered herein is contrary to the evidence.

Eighth. That the Court erred in holding that the Immigration Records from the immigration authorities of the Philippine Islands affecting a supposed prior landing at Manila of persons claiming to be the wife and children of the father of these detained was sufficient in law to discredit the said father and to cause the said petition to be denied.

Ninth. The Court erred in holding that the Secretary of Labor did not abuse the discretion vested in him in using the immigration record mentioned and described in the foregoing assignment for the purpose of discrediting the father of the said detained and in supporting his denial of their application to enter the United States.

Tenth. That the Court erred in holding that the Secretary of Labor did *no* abuse the discretion vested in him in discrediting the testimony of the father of the said detained and in denying their application to enter the United States by reason of a former affidavit made by the father respecting one of his sons' coming to the United States.

Eleventh. The Court erred in holding that the Secretary of Labor did not abuse the discretion

vested in him in rejecting the testimony submitted upon behalf of the said detained and in not holding that the legal weight and sufficiency of said testimony was sufficient as a proposition of law to legally establish the citizenship of the said detained. [16]

WHEREFORE, the appellants pray that the judgment and order of the Southern Division of the United States District Court for the Northern District of the State of California, First Division, made and entered herein in the office of the clerk of the said court on the 21st day of October, 1920, discharging the order to show cause, sustaining the demurrer and in denying the petition for a writ of habeas corpus, be reversed, and that this cause be remitted to the said lower court with instructions to discharge the said Chang Sim and the said Chang Yet from custody, or grant them a new trial before the lower court, by directing the issuance of the writ of habeas corpus as prayed for in said petition.

Dated, San Francisco, California, November 29th. 1920.

GEO. A. McGOWAN,

Attorney for Petitioners and Appellants.

Service of the within notice and petition for appeal and assignment of errors and receipt of a copy thereof is hereby admitted this 2d day of December, 1920.

FRANK M. SILVA,

U. S. Atty.

[Endorsed]: Filed Dec. 3, 1920. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [17]

In the Southern Division of the United States District Court in and for the Northern District of the State of California, First Division.

No. 16,859.

In the Matter of CHANG SIM and CHANG YET,  
on Habeas Corpus.

**Order Allowing Petition for Appeal (and Releasing  
on Bond).**

On this 3d day of December, 1920, come Chang Sim and Chang Yet, the detained herein, by their attorney, George A. McGowan, Esq., and having previously filed herein, did present to this court their petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by them, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court hereby allows the appeal herein prayed for, and orders execution and remand stayed pending the hearing of the said cases in the United States Circuit Court of Appeals for the Ninth Circuit, that the appellants may remain at large upon the bonds, in the sum of one [18] thousand dollars



(\$1,000.00) each, previously given and accepted herein, and that they remain within the United States, and render themselves in execution of whatever judgment is finally entered herein at the termination of said appeal, and that the United States Marshal for this District is authorized to take the detained into his custody for the purpose of effecting their release upon said bond.

Dated, San Francisco, California, December 3d, 1920.

M. T. DOOLING,  
United States District Judge.

Service of the within order and receipt of a copy thereof is hereby admitted this 2d day of December, 1920.

FRANK M. SILVA,  
U. S. Atty.

[Endorsed]: Filed Dec. 3, 1920. W. B. Maling,  
Clerk. By C. M. Taylor, Deputy Clerk. [19]

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In the Southern Division of the District Court of  
the United States, in and for the Northern Dis-  
trict of California, First Division.

#16,859.

In the Matter of CHANG SIM and CHANG YET,  
(4—22 “Korea Maru,” July 22, 1919; 12—15  
“Nanking,” Nov. 30, 1919), on Habeas  
Corpus.

**Stipulation and Order Respecting Withdrawal of  
Immigration Record.**

IT IS HEREBY STIPULATED AND AGREED by and between the attorney for the petitioner and appellant herein, and the attorney for the respondent and appellee herein, that the original immigration records (Exhibits "A," "B" and "C") in evidence and considered as part and parcel of the petition for a writ of habeas corpus upon hearing of the demurrer in the above-entitled matter, may be withdrawn from the files of the clerk of the above-entitled court and filed with the clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, there to be considered as part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record and so certified to by the clerk of this court.

Dated, San Francisco, California, June 10, 1921.

GEO. A. McGOWAN,

Attorney for Petitioner and Appellants.

FRANK M. SILVA,

United States Attorney for the Northern District of  
California,

Attorney for Respondent and Appellee. [20]

**ORDER.**

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said Immigration Record therein referred to may be withdrawn from the office of the clerk of this court and filed in the office

of the clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by the clerk of this court.

M. T. DOOLING,

United States District Judge.

Dated, San Francisco, California, June 10, 1921.

[Endorsed]: Filed Jun. 11, 1921. W. B. Maling,  
Clerk. By C. M. Taylor, Deputy Clerk. [21]

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**Certificate of Clerk U. S. District Court to  
Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 21 pages, numbered from 1 to 21, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the Matter of Chang Sim and Chang Yet, on Habeas Corpus, No. 16859, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein), and the instructions of the attorney for petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of seven dollars and seventy-five cents (\$7.75),

and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal issued herein (page 23).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of June, A. D. 1921.

[Seal]

WALTER B. MALING,  
Clerk.

By C. M. Taylor,  
Deputy Clerk. [22]

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**(Citation on Appeal.)**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco, and to FRANK M. SILVA, United States Attorney for the Southern Division, Northern District of California, His Attorney Herein, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Southern Division thereof, wherein Chang Sim and Chang Yet are appellants and you are appellee, to show cause, if any there be,



why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. H. HUNT, United States Circuit Judge for the Southern Division, Northern District of California, this 16th day of April, A. D. 1921.

WM. H. HUNT,  
United States Circuit Judge.

Service *within the* citation on appeal and receipt of the copy thereof is hereby certified this 16th day of April, 1921.

FRANK M. SILVA,  
United States Attorney.

Per GEIS.

This is to certify that a copy of the within citation on appeal has been this day lodged with me as clerk of the United States District Court for the Northern District of California, Southern Division thereof.

W. B. MALING,  
Clerk.

By C. W. Calbreath,  
Deputy Clerk.

[Endorsed]: No. 16,859. United States District Court for the Northern District of California, Southern Division. Chang Sim and Chang Yet (on Habeas Corpus), Appellants, vs. Edward White, as Commissioner of Immigration, Port of San Francisco, Appellee. Citation on Appeal. Filed Apr. 16,

1921. W. B. Maling, Clerk. By C. W. Calbreath,  
Deputy Clerk. [23]

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[Endorsed]: No. 3696. United States Circuit Court of Appeals for the Ninth Circuit. Chang Sim and Chang Yet, Appellants, vs. Edward White, as Commissioner of Immigration for the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed June 11, 1921.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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In the Southern Division of the District Court of the United States, in and for the Northern District of California, First Division.

#16,859.

In the Matter of CHANG SIM and CHANG YET  
(4—22 “Korea Maru,” July 22, 1919; 12—15  
“Nanking,” Nov. 30, 1919), on Habeas  
Corpus.

**Order Extending Time to Docket Case.**

Good cause appearing therefor, and upon motion of Geo. A. McGowan, Esq., attorney for the petitioners and appellants herein:

IT IS HEREBY ORDERED that the time within which the above-entitled case may be docketed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit may be and the same is hereby extended for a period of thirty (30) days from and after the day hereof.

Dated, San Francisco, Cal., May 14, 1921.

WM. B. GILBERT,  
United States Circuit Judge.

[Endorsed]: No. 3696. United States Circuit Court of Appeals for the Ninth Circuit. Order Extending Time to Docket Case. Filed May 14, 1921. F. D. Monckton, Clerk. Refiled Jun. 11, 1921. F. D. Monckton, Clerk.

No. 3696

2  
IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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CHANG SIM and CHANG YET,

*Appellants,*

VS.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

*Appellee.*

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## BRIEF FOR APPELLANTS.

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GEO. A. MCGOWAN,

550 Montgomery Street, San Francisco,

*Attorney for Appellants.*

FILED

OCT 3 - 1921

F. D. MONCKTON,  
CLERK





No. 3696

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

CHANG SIM and CHANG YET,

*Appellants,*

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

*Appellee.*

## BRIEF FOR APPELLANTS.

### Statement of the Case.

These two appellants, Chang Sim and Chang Yet, seek to enter the United States as citizens thereof, they being foreign born sons of a citizen of the United States.

Chang Sim arrived at the Port of San Francisco on the SS "Korea Maru" July 22, 1919, whereas Chang Yet arrived November 30, 1919, at the same port on the SS "Nanking". Their applications were denied by the Immigration authorities and this denial was sustained upon appeal by the Acting Secretary of Labor. A petition was filed in the lower

court for habeas corpus (T. R. 2-8), an order to show cause was issued (T. R. 9) to which the Government responded by a demurrer (T. R. 11); on the hearing of this demurrer the Immigration records were filed and deemed a part of the petition, which was to be tested by the demurrer (T. R. 12); the demurrer was sustained (T. R. 13). From this order a notice of appeal and petition for the allowance of appeal (T. R. 14-15), together with assignment of errors (T. R. 16-18) were filed and presented and an order was made allowing said appeal (T. R. 19-20). By stipulation and order (T. R. 21-22) the original Immigration records were withdrawn from the lower court and filed in the clerk's office of this court.

The testimony in support of the claim of relationship in this case shows without question that the father was a citizen of the United States, that he was in China at a time necessary to render the paternity of these appellants possible and throughout all of his various examinations before the Immigration authorities it appears that he has consistently claimed these appellants as his sons. The testimony before the Immigration Service of the two appellants, their father and their supporting witnesses was singularly free from any discrepancies or inconsistencies of a material character. Such variations as existed were trivial and were not deemed sufficiently detrimental to the cases of these appellants to have caused a denial to be entered. During the course of the examination conducted in the case

of Chang Sim he was ordered paroled by the Immigration authorities and remained at liberty for some considerable period of time. The appellant Chang Yet subsequently arrived at this Port and after certain papers had been received from Manila the cases were set for final hearing, which resulted in a denial and the order of parole was at that time revoked and the appellant Chang Sim was returned to the custody of the respondent.

The reasons for the denial before the local service and before the Acting Secretary of Labor at Washington, which caused them to refuse to land these appellants are two in number, and the propriety of these two reasons is challenged in this habeas corpus proceeding.

The first matter had to do with what is alleged to be an unauthenticated copy of a report of a Board of Special Inquiry at the Port of Manila, Philippine Islands, dated June 25, 1906. No record of the testimony was apparently taken or preserved. Appellants contended before the court below and contend here that this record was improperly admitted in evidence and should have been excluded as a basis for any unfavorable consideration of the cases of these appellants.

The second adverse feature considered by the Board and the Acting Secretary of Labor was an affidavit made by the father of these appellants some seven years ago at a time when he contemplated bringing one of his sons to this country. Through



a mistake of a Chinese interpreter or an attorney in Fresno, the facts relating to the first and second sons were confused and a photograph of a boy other than that of the son in question had been inadvertently, through the mistake of the interpreter or the attorney, placed upon the affidavit. It is contended that the father's explanation of this matter was so convincing and so reasonable that it was an abuse of discretion to disregard the same.

The above two features are alleged as elements of unfairness and constitute two of the points to be considered upon this appeal. The third and last point has to do with the conclusiveness of the evidence presented upon behalf of appellants showing their right to be admitted into the United States as citizens thereof.

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### Argument.

#### FIRST.

That the court below erred in holding that the unauthenticated copy of a report of a Board of Special Inquiry at an Immigration hearing at Manila in the Philippine Islands, was competent evidence, and notwithstanding its not being authenticated and without the evidence upon which the report was based, was sufficient to discredit these appellants, their father and their supporting witnesses and cause the denial of their application to enter the United States.

## SECOND.

That the court below erred in holding that in rejecting the explanation of the father of appellants regarding the circumstances surrounding the 1914 affidavit of the father sufficient legal ground existed to discredit the father and the appellants and their supporting witnesses and reject the applications of the appellants to enter the United States.

## THIRD.

The court below erred in holding that the evidence presented upon behalf of these appellants to enter the United States was not of such legal sufficiency and weight as to be an abuse of discretion upon the part of the Immigration authorities and the Acting Secretary of Labor in refusing the appellants admission into the United States as citizens thereof.

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*First.* Upon the competency of the unauthenticated copy of what is supposed to be a report of a Board of Special Inquiry at an Immigration hearing at Manila, Philippine Islands of June 25, 1906, I desire to direct attention to the recent decision of the Supreme Court of the United States in the case of *Kwock Jan Fat v. White* (253 U. S. 454; 40 Sup. Ct. 566), wherein the court held in the concluding portion of its decision:

“The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power

to be administered not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of the Commissioner of Immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

It is to be observed that the Supreme Court has clearly laid down the rule that it is incumbent upon the Immigration authorities to preserve a complete record of their proceedings as much for the enlightenment of the court as for their own purposes. This document, which purports to be a copy of a report of a Board of Special Inquiry held at Manila, is not authenticated, it is entirely in typewriting, it does not bear a signature or verification, and while certain testimony was given, apparently no record or copy thereof was filed in this case. Whether it was preserved or whether any record was ever made of it is unknown; it was, and is, the vital point in this case. An examination of the record amply supports this assertion. The Immigration record of these

cases which contains the memorandum for the Assistant Secretary dated April 17, 1920, and April 29, 1920, amply supports this view, and comments and draws from this report from Manila. That report is in vital contradiction of the sworn testimony of the father in these cases. The father testified here that he never testified or made any statement at all before the Immigration authorities in Manila, yet the Department at Washington find that he did testify. The only foundation for that assertion is this unauthenticated report. If the father did testify there the transcript of his testimony should have been produced and not the official summary of what they deem the situation probably called upon him to represent. It is apparent from reading this entire report, from Manila which, by the way, obviously covers a large number of other cases, and was undoubtedly made up after the hearing itself had terminated as to all of the many applicants for admission, that these officers may have been in error in their recollection as to whether or not this father testified before them or they may have presumed from the surrounding circumstances that he stated certain facts as true, whereas according to the sworn testimony of the father in this proceeding he never made any statement before the Manila Immigration authorities at all. Here is a plain and determinating conflict between the father's sworn testimony here and an unauthenticated copy of a supposed report of a Board of Special Inquiry at Manila which refers to testimony, but does not



submit evidence upon which the report is supposed to be based. We contend that this clearly comes within the rule laid down by the Supreme Court in *Kwock Jan Fat v. White*, supra, and that this case should be reversed as that case was reversed because a full record was not preserved of the Immigration hearing in question. The Supreme Court has laid down the rule that it is essential and it is obligatory upon the Immigration authorities to preserve a full record and for failure so to do the hearing rendered was unfair and the writ was directed to issue returnable before the court below for a trial on the merits. The decision concludes as follows:

“The practice indicated in *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, is approved and adopted, the judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for trial of the merits. Judgment reversed. Writ of habeas corpus to issue.”

Attention is directed to the report of September 29, 1919, page 48 of the Chang Sim record, by the Chairman of the Board wherein he directs the return of this case to Fresno for the further examination of the father as to this Manila episode. Attention is also directed to the examination of the father on October 6, 1919, pages 53 to 50 of the record, which contains the father's explanation of this matter. It is so reasonable and convincing as to admit of no doubt of the truth of his statement. Certainly this cannot be ignored and set aside by an unauthenticated and unsigned copy of a report which recites

the testimony was taken but does not submit it with the record.

*Second.* Upon the question of the affidavit of 1914 of the father made in support of the application of Chang Yick to enter this country, attention is directed to the report of Inspector Butler of August 27, 1919, page 33 of the Chang Sim record, wherein he calls attention to the existence of this affidavit in the Immigration files, and states the father should be confronted with it. The examination of the father with respect to this matter took place on September 11th, and comprises pages 39 and 37 of the Chang Sim record. The following is an extract from pages 39 and 38 thereof:

“Q. What explanation have you to offer in regard to this discrepancy?

A. It was this way, I had a cousin named Gen Chin, who formerly lived in Fresno, he claimed to know all about making out landing papers, I wanted to bring my oldest son to this country so I gave him the facts as to the births of all my children, my photographs and those of my son. He had a lawyer here named Crichton, who is the Chinese lawyer in this town, get up the affidavit. After they had it all fixed, they called me to the office to sign it. The same day I signed, I was called to San Francisco. There were no photographs pasted on it as yet when I signed it and as I could not read English I didn't know what was on that paper. The lawyer said it was all right, so I signed it. When I returned from San Francisco two weeks later, I was given a copy of it to send to my son in China, but as soon as I got it I saw they had not put my son's photograph on it. I got an interpreter to read it to me and through him found

out that it was all wrong. In giving the date of birth of my oldest son they had put a date that about corresponded to the date of my second son's birth. I spoke to Gen Chin about it, and he said the lawyer had made the mistakes. I went to the lawyer and he said that he had put in just what Gen Chin had told him. He said the day I went to see him that he had already sent a copy to the Government office at San Francisco. They did not prepare any paper for my witness and I have been told that this Chinese lawyer, Mr. Crichton, mixed up everything he does just the same way he mixed up my business."

An examination of the Immigration file will show that this affidavit was mailed to the Immigration office in San Francisco by Attorney Crichton, that it was placed in the Immigration files with the information that nothing would be done with it until the boy arrived at this Port. No fraudulent purpose could be predicated upon such affidavit. Applicants for admission are not landed upon such papers which merely form the foundation for the trying and exacting examination which takes place after they arrive at the Port of admission. That affidavit was made out in 1914, and the father did not bring his son to this country until five years thereafter, or in 1919. The record does not disclose any attempted fraud upon his part. His statements were open to challenge if they were not true. Attorney Crichton is living in Fresno today just as he was at that time and there is an Immigration inspector permanently detailed for duty in Fresno, and had there been any question about the correctness of the father's state-

ment, or about placing the responsibility of this mistake upon Attorney Crichton, it certainly was the duty of the Immigration officials, before rejecting the father's explanation to go to Attorney Crichton and take a statement from him. This is not a case where the father makes a statement that cannot be refuted or examined into or challenged by the Immigration authorities; exactly the contrary is the case, the responsibility for this mistake was laid upon Attorney Crichton, who was then, and is now, in Fresno, and is well known as being an attorney who handles a large part of the Chinese business there. The Immigration officials had during all of that time, and still have a permanent inspector detailed in that city, and who is quite familiar with this condition, and before the Immigration authorities were warranted in setting aside the father's explanation it was their duty, and the obligation rested upon them, to go to Attorney Crichton and take a statement from him as to the father's assertions in this matter. These Immigration officials are investigating officers, and they do not discharge their duty by simply taking the testimony of a witness. When the truth or falsity of that witness's testimony is subject to verification, as was the case here, it certainly was incumbent upon the Immigration officers and was their bounden duty in the premises to investigate the truth or falsity of the statement of the father before they attempted to disregard it. Attorney Crichton was there in Fresno and was presumably well known to the Immigration inspector who



lives there, and a statement could, and should have been taken from him before any attempt was made to reject the father's explanation.

The court held in *Lee Kan v. U. S.* (62 Fed. 914), at page 920, as follows:

“ \* \* \* The burden of proof is on the person seeking to land, and the character of the facts which he must prove, the time which they must have existed, and the witnesses by whom proved, together with the possibilities of counter proof inevitably suggested, make deception impossible, except under a very negligent administration of the law.”

It will be noted that this court clearly and positively pointed out “*the possibilities of counter proof inevitably suggested*”, thus clearly and indisputably indicating that it was incumbent upon the Immigration officers themselves to examine into the possibilities of counter proof which the circumstances of any given case might indicate. In *U. S. v. Chin Len* (187 Fed. 544), at page 550, the Circuit Court of Appeals for the Second Circuit held as follows:

“The case is much stronger than many of the reported cases where the Chinese persons, seeking entrance, endeavored by the testimony of witnesses to establish their citizenship. In the present case that fact had been judicially determined by the finding of a competent tribunal. The inspector was not justified in arbitrarily disregarding this judgment. He could prove it to be invalid or fraudulently issued, but he could not treat it as a nullity upon mere suspicion and conjecture. He was bound to treat it as valid until its invalidity was established. The rele-

vant question of fact was presented so far as the commissioner's judgment was concerned, or, indeed, upon the question of identity."

The foregoing case referred to the effect of a judgment that it could not be ignored or treated as a nullity upon mere suspicion and conjecture and that it must be treated as valid until the invalidity was established. In the case at bar the point is not based upon a judgment, it is based upon the sworn testimony of the father, which is not contradicted or impeached by anything in the record, and it is, therefore, contended that the explanation being reasonable and satisfactory in itself was entitled to be accepted as the truth until the invalidity of the explanation could be shown by testimony. The way to test the explanation was open to the inspector at Fresno where the transaction took place and where Attorney Crichton, whom the father charged with the responsibility of the mistake, resided. The Immigration officials could not ignore this reasonable explanation and treat it as false in furtherance of any whim or caprice of their own. They had the power to test its truth by themselves questioning Attorney Crichton, whom the father charged as being responsible for the "mixup". The Government officers seemed to feel that it was not incumbent upon them to test the truth of the father's statements at all, but they simply ignored them and that obviously because the father was a Chinaman. They certainly would never have treated the testimony of a white witness in any such way. This

court held in *Woey Ho v. U. S.* (109 Fed. 888), at page 890 as follows:

“A court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. All people, without regard to their race, color, creed, or country, whether rich or poor, stand equal before the law. It is the duty of the courts to exercise their best judgment, not their will, whim or caprice, in passing upon the credibility of every witness. The question whether a witness is credible must ordinarily be determined by the tribunal before whom the witness appears, and in the decision in which that tribunal must necessarily be vested with a very wide discretion. In weighing the scales, the conduct, manner, and appearance of the witness, as seen by that tribunal, often forms an important factor in enabling courts, as well as juries, to determine whether or not the witness is entitled to credit. Appellate courts are, in the very nature of the case, deprived of the opportunity to apply this test, which in a doubtful case might control the judgment of the trial court.”

It is to be noted that the Immigration inspector at Fresno who conducted the examination of the father was apparently satisfied with his explanation, and he is the only one who came in direct or personal contact with the father in this matter. He being satisfied, and the record does not indicate the contrary, there exists no reason or ground for the officers who afterwards exercised, let us say, appellate functions, to disregard and ignore this most reasonable testimony, particularly when they know that their officers had neg-

lected every opportunity to test the truth of his explanation, when the method and manner and the witness was immediately available and subject to their examination. The doctrines enunciated in the Woey Ho case, last mentioned, have been re-affirmed by this court in the recent case of Yee Chung v. U. S. (243 Fed. 126, 130). One of the cases cited in this last mentioned case is that of Woo Jew Dip v. U. S. (192 Fed. 471), where at page 474, the Circuit Court of Appeals for the Fifth Circuit held as follows:

“The right of appeal to this court is unquestioned, and the appellant is entitled to our conscientious judgment. See *Gee Cue Beng v. United States*, 184 Fed. 383, 106 C. C. A. 493, and authorities there cited. On the evidence, we find no sufficient reason to assign perjury to the appellant and his witnesses, and without such assignment we are bound to take their evidence as practically undisputed. The case itself and certain circumstances developed by the evidence may engender some suspicion, even doubt, on the main proposition, but these deportation cases are civil, and not criminal, in their nature (*U. S. v. Hung Chang*, 134 Fed. 19-25, 67 C. C. A. 93, and cases there cited), and therefore to be decided by the preponderance of the evidence, even if, as is so strenuously contended, the burden of proof is on the person charged with alienage, but asserting citizenship to prove his citizenship. There cannot be any question that here the evidence in favor of the appellant outweighs all that can be claimed to the contrary by the United States. On the evidence *Woo Jew Dip* is a citizen of the United States. *United States v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890.”



*Third.* Upon this point we contend the evidence was of such conclusive kind and character that it was an abuse of discretion to have disregarded it. That such a ground is sufficient in point of law to afford relief has been upheld by the Supreme Court in *Tang Tun v. Edsell* (223 U. S. 673, 681, 682; 32 Sup. Ct. 359, 363; 356 L. Ed. 606), and that august tribunal has already decided that even an adverse action of the Secretary must find adequate support in the evidence, *Zakonaite v. Wolf* (226 U. S. 272, 274; 33 Sup. Ct. 31; 57 L. Ed. 218).

In the case at bar it is to be noted that the Board of Special Inquiry were so satisfied with the conclusive nature and character of the evidence presented upon behalf of this applicant that they did on October 15, 1919 (Immigration record, page 57), direct the parole landing of the appellant Chang Sim, during the time that it was necessary to send to Manila for the Immigration record mentioned in the first part of this brief. It is unprecedented in the Immigration service to so land a person upon parole unless the evidence presented in its case is so satisfactory in its nature as to forecast a favorable decision. It must be borne in mind that this recommendation of parole and the order of parole was made with full knowledge of the father's explanation about the Manila episode and with full knowledge of the prior affidavit which formed the subject of the discussion of the second point of this brief. The denial of these cases in the face of the conclusive showing of the evidence that the relation-

ship existed was predicated and considered solely by reason of the Manila episode and the matter of the affidavit, which forms the first and second subjects discussed in this brief. This is shown by the finding of the Board which comprises pages 71 and 72 of the Chang Sim Immigration record, and is also shown by the finding of the Board in the Chang Yet record. The review of the evidence in this case made for the Acting Secretary of Labor on the appeal to that official shows that the adverse action is based quite exclusively upon these two propositions. The attorneys for the appellant before the Department filed their brief which is dated April 28, 1920, and it is shown that their brief is virtually confined to these two same matters. An oral hearing was accorded before the Acting Secretary and the final memorandum prepared on April 29, 1920, and their final decision is as follows:

“In re Chang Sim and Chang Yet.  
Memorandum for the Acting Secretary:

Attention is invited to the summary of April 17th, at marker, The applicants' local attorney has since reviewed the record and submitted a brief in their behalf, which is attached next hereunder. The bureau has read same, but it does not believe that the arguments advanced therein are sufficient to overcome the unfavorable features in the case. This is particularly true with respect to the attempted explanation of the mixup with reference to the affidavit submitted in 1914. The alleged father claims now that the photograph appearing thereon is not that of his alleged son, and was attached by mistake, and his testimony indicates that he had knowledge of such mistake ever since it was made. He has

never, up to the present proceeding, attempted to rectify the mistake or to advise the Government regarding same so that its record could be straightened out. Presuming his explanation of the Manila episode to be the correct one, he is in the position of having in the past been a willing party to a fraud practiced upon the Government, which naturally tends to discredit his testimony at this time.

The Bureau has carefully gone over this record, but does not believe that the status of the applicants has been established to a degree sufficiently convincing to justify their admission as American citizens. It is accordingly recommended that the appeals be dismissed:

(Signed) Alfred Hampton, Assistant Commissioner General.

Attys. Ralston & Hott.

May 24, 1920,

Appeal dismissed.

(Signed) John W. Abercrombie,  
Acting Secretary.

Oral hearing before Acting Secretary:

Present: Acting Secretary,

Mr. Hott, of Counsel,

Mr. Sisson } Bureau of Immigration."  
Mr. Booth }

From the foregoing it appears that after the oral hearing based in this matter the Acting Secretary dismissed the appeal on May 24, 1920, upon the two dominating issues mentioned in the first and second points. The Acting Secretary virtually accepts the explanation of the father as to the Manila episode, but seems to lay particular stress upon the matter of the affidavit, the Acting Secretary holding that

“he has never, up to the present proceeding, attempted to rectify the mistake or to advise the Government regarding same so that its record could be straightened out.”

In this connection it is to be noted that this father is not educated in the English language, he could not read himself, it was not obvious to him that any wrong had been done the Government in any sense, no person could attempt to land as his son save that they would have to go to the father himself to be examined as a witness in his behalf and the father would certainly not testify for any person who was not his son, hence it was not apparent to the father how the interests of the Government were prejudiced or injured in the slightest by this affidavit which was made out in 1914. The father's explanation of this matter is too reasonable and conclusive in its effect to have been disregarded and held up as legally sufficient and denied its appropriate effect. Attention is directed to the fact that this father appeared before the United States Consul General at Hong Kong presumably on April 19, 1907, and made a statement before Stuart J. Fuller, the American Vice and Deputy Consul General, when he registered before him as an American citizen, in which he gave a complete description of his family, naming his wife and her place of residence in China, together with the names and birth dates of his three children in which are included these two appellants. This certificate is over the hand and seal of the American Vice and Deputy Consul General. The original doc-



ument is used as an exhibit in this case and is to be found in Exhibit "C", page 12. This document in itself is the strongest possible evidence of the bona fides of these cases, and is an absolute repudiation of the pretensions of the Government with respect to the family that was landed at Manila on June 25, 1906.

The father's explanation with respect to this family is to show that they were theatrical people who staid in Manila two or three months on a theatrical tour and then returned to China, thus showing that no harmful effect resulted and that no fraud was perpetrated upon the Government. What purposes to be a certificate which concludes the report of the Board of Special Inquiry shows that actors and actresses were deemed as members of the exempt classes and were admitted at Manila for temporary purposes. The record shows that these people came to Manila as actors and actresses, stayed in Manila, two or three months, and doubtless having finished their theatrical tour, returned to China. The father tells in his explanation that he thought that these people might have injured him by representing themselves as members of his family, and when he went back to Hong Kong he appeared before the American Consulate and made his registration as an American citizen and gave the name and residence of himself, his wife, and the names and birth dates of his three children.

What purports to be this unauthenticated copy of a hearing before a Board of Special Inquiry is also



contained in Exhibit "C". This obviously covers a large number of cases and only case 14 refers to the father of these appellants, while cases Nos. 15, 16, 17, and 18 refer to the women concerned in this Manila episode. The large number of cases admittedly considered by this Board of Special Inquiry would necessitate that some permanent record was made of the hearing of this case, and if any testimony was taken the same should have been submitted; if no record was made of that testimony it is obvious that this long report could not have been contemporaneously made covering all of these many cases. Certainly there should have been some authentication of this document to prove its genuineness and the testimony reported to have been taken should have been reduced to a permanent record for the use of the Immigration officials and also the court. We feel that the positive nature and character of this evidence is such that it cannot be ignored, overlooked or set aside, and that the matters relied upon by the Government are legally incompetent and insufficient to sustain their adverse action.

In finally submitting this matter I feel that the said decision of the Supreme Court in the case of *Kwock Jan Fat v. White*, supra, absolutely controls. The citizenship of these appellants is a sacred and a valuable thing to them and should not be set aside for any such legally insufficient reasons or pretenses as seemed to have been indulged in by the executive officers in this matter. The Supreme Court said in the *Kwock Jan Fat* case:

“ \* \* \* It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.”

I feel that the general principles therein enunciated should prevail and control in this case.

Dated, San Francisco,

October 1, 1921.

Respectfully submitted,

GEO. A. MCGOWAN,

*Attorney for Appellants.*

No. 3696

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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CHANG SIM and CHANG YET,  
*Appellants,*  
vs.

EDWARD WHITE, as Commissioner  
of Immigration for the Port of San  
Francisco,  
*Appellee.*

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## APPELLEE'S REPLY BRIEF

JOHN T. WILLIAMS,  
*United States Attorney,*

BEN F. GEIS,  
*Assistant United States Attorney.*



No. 3696

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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CHANG SIM and CHANG YET,	
	<i>Appellants,</i>
vs.	
EDWARD WHITE, as Commissioner	
of Immigration for the Port of San	
Francisco,	
	<i>Appellee.</i>

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## APPELLEE'S REPLY BRIEF

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### STATEMENT OF FACTS.

Chang Sim and Chang Yet, the appellants herein, are applicants for admission into the United States as citizens thereof, claiming to be the foreign-born sons of C. Waitong, whose citizenship is conceded.

Both applicants were given hearings before a Board of Special Inquiry and their applications for admission denied. From said denial an appeal was taken to the Secretary of Labor, where said appeal was dismissed and the applicants ordered deported.

Thereafter Petition for Writ of Habeas Corpus (Tr. p. 2) and Order to Show Cause (Tr. p. 9)



was filed, to which the respondent interposed a demurrer (Tr. p. 11), which said demurrer was sustained and petition denied (Tr. p. 13).

### ARGUMENT.

It is alleged in the petition herein that the detained were deprived of the full and fair hearing and consideration of their cases to which they were entitled under the statutes. Second, that the action of the Board of Special Inquiry and the Secretary of labor was and is in excess of the authority committed to them by the statutes and the rules and regulations promulgated thereunder.

### AS TO UNFAIRNESS.

*Were the hearings in these cases manifestly unfair?*

The appellant Chang Sim arrived at the Port of San Francisco on the S.S. "Korea Maru", July 24, 1919, and thereupon made application to enter the United States as a citizen thereof, claiming to be the foreign-born son of C. Waitong (Exhibit A, p. 89). In support of his application there was filed the affidavit of the alleged father, bearing the photograph of the said C. Waitong and the applicant Chang Sim, which said affidavit on the reverse side thereof bears the stamp and seal of the Consul General of the United States at Hongkong (Exhibit A, p. 2). There was also filed the affidavit of an identifying witness Wong Sing Chong (Exhibit A, p. 1).

As the alleged father and witness lived in Fresno, California, and it was therefore inconvenient for them to appear at Angel Island for examination before a Board of Special Inquiry, it was stipulated and agreed that their testimony might be taken by a single inspector and that the evidence so obtained might be presented to the Board of Special Inquiry for its consideration and made a part of the record. (Exhibit A, pp. 6 and 5).

Thereafter, to wit, August 14, 1919, the testimony of the alleged father Chang Waitong (Exhibit A, pp. 20 and 11) and the witness Wong Sing Chong (Exhibit A, p. 16) was taken and transcribed by Inspector Moore at Fresno, California, and forwarded to the Commissioner of Immigration at San Francisco, together with his report, and the same made a part of the record. (Exhibit A, pp. 22, 23).

Thereafter, to wit, August 25, 1919, the testimony of appellant Chang Sim was taken before a Board of Special Inquiry (Exhibit A, p. 32) and said Board voted that action be deferred for further examination of the alleged father at Fresno, relative to an affidavit filed by him in 1914 (Exhibit B, p. 2) and for the purpose of securing the files of the Honolulu office relating to the alleged father (Exhibit A, p. 25).

Thereafter, to wit, September 11, 1919, a further examination of the alleged father was made by Inspector Moore at Fresno, whose report and a copy

of the testimony was made a part of the record. (Exhibit A, pp. 40, 39).

Thereafter, to wit, September 29, 1919, Chang Sim was again before the Board of Special Inquiry at which time it was voted to defer action for further statement of the alleged father (Exhibit A, pp. 47, 46) relative to the endorsement on the back of copy of naturalization certificate showing his landing at Manila, P. I., on the "S. S. Tean", June 22, 1906, as a citizen of the United States, said endorsement showing that he was accompanied by wife and family (Exhibit C, pp. 11, 12).

Thereafter, to wit, October 6, 1919, the alleged father was further examined at Fresno by Inspector Moore, whose report and transcript of testimony is made a part of the record (Exhibit A, pp. 54, 53).

Thereafter, to wit, October 15, 1919, the Board, after considering the additional testimony of the alleged father, voted that action in the case be further delayed for reports from Honolulu and Manila, and recommended that the applicant be paroled to counsel pending receipt of said reports. (Exhibit A, p. 56).

Chang Sim was thereafter paroled to attorneys Edsell & Dye (Exhibit A, pp. 58, 89).

Thereafter, report of Inspector Farmer of Honolulu (Exhibit A, p. 67), together with the testimony of Chang Woung Ming (Exhibit A, p. 66), was received and made a part of the record.

Thereafter a copy of Chinese Board Report No. 594 "S. S. Tean", June 22, 1906, was received under cover of letter from the Insular Collector of Customs at Manila, dated December 2, 1919, and the same made a part of the record (Exhibit C, pp. 1 to 10).

Thereafter, to wit, January 26, 1920, the Board of Special Inquiry, after a careful consideration of all the evidence in the case, was not satisfied that the relationship claimed existed and voted to defer for ten days for further evidence (Exhibit A, pp. 70, 71, 72 and 73), and the attorneys of record were so notified in writing. (Exhibit A, p. 74).

Thereafter, said attorneys advised the Commissioner of Immigration that they had no further evidence to offer and asked that the case proceed to final conclusion by the Board. (Exhibit A, p. 75).

Thereafter, to wit, February 10, 1920, the Board voted to exclude the applicant on the ground "that the relationship alleged does not exist," (Exhibit A, p. 77), and the attorneys of record were notified of the Board's excluding decision (Exhibit A, p. 79) and thereupon filed notice of appeal (Exhibit A, p. 80).

Thereafter, attorneys of record were given full opportunity to review the entire record together with exhibits, as appears from their receipt therefor. (Exhibit A, p. 86).

The appellant Chang Yet arrived at the Port of

San Francisco on the S. S. "Nanking" November 30, 1919, and thereupon made application to enter the United States as a citizen thereof, claiming to be the foreign-born son of C. Wai Tong, whose citizenship is conceded. (Exhibit A, p. 127.)

In support of his said application he filed the affidavit of his alleged father bearing the photographs of said C. Wai Tong and the applicant. There was also filed the affidavits of Wong Sing Chong and Chang Sim, the other applicant herein (Exhibit A, pp. 91, 94).

At the request of applicant's attorneys the record was forwarded to Fresno, California, for the taking of the testimony of said witnesses (Exhibit A, p. 95).

Thereafter, to wit, December 19, 1919, the testimony of Chang Wai Tong (Exhibit A, p. 106), Chang Sim (Exhibit A, p. 104) and Wong Sing Chong (Exhibit A, p. 99) was taken at Fresno by Inspector Moore and together with his report (Exhibit A, p. 107) was made a part of the record herein.

Thereafter, to wit, February 3 and 4, 1920, the testimony of the applicant was taken before a Board of Special Inquiry (Exhibit A, pp. 115, 119), and at the conclusion of said hearing the said Board voted to defer action for ten days to allow the production of additional evidence on the question of relationship (Exhibit A, p. 116), and the attorneys of record were so notified in writing (Exhibit A, p. 121).

On February 6, 1920, said attorneys notified the



Commissioner of Immigration that they had no further evidence to offer and asked "that the case proceed to final conclusion by the Board promptly." (Exhibit A, p. 122.)

Thereafter, to wit, February 10, 1920, the Board of Special Inquiry, after a careful consideration of all the evidence adduced, voted to exclude the applicant and he was so notified (Exhibit A, p. 123).

From said excluding decision an appeal was taken to the Secretary of Labor (Exhibit A, p. 124), and the attorneys of record were given full opportunity to review the entire record in the case, including exhibits, as appears from their receipt therefor. (Exhibit A, p. 126.)

Thereafter, to wit, March 29, 1920, the records in both of these cases were forwarded to the Secretary of Labor, Washington, D. C., on appeal (Exhibit A, p. 128). During the pendency of these cases before the Department the applicants were represented by Messrs. Ralston & Hott, attorneys at law (Exhibit A, pp. 129, 130), who filed a brief in their behalf (Exhibit A, p. 142) together with an additional affidavit of the alleged father C. Wai Tong (Exhibit A, p. 140). The reasons for dismissing the appeal are fully set out in the memorandum prepared for the Acting Secretary at pages 135, 136 and 145 of Respondent's Exhibit A, and the Court's attention is respectfully called to said memorandum.

We believe and confidently urge that an inspection of the records in this case will disclose that the alle-

gation in the petition that the conduct of the hearings in these cases was or is unfair is not supported by the facts disclosed by said records. But, on the contrary, the records show that every jurisdictional step necessary to a fair though summary hearing was taken. An opportunity was afforded for the production of any and all witnesses, or other evidence, and all witnesses so produced were fully and fairly heard.

The petition herein does not show nor does an inspection of the immigration record disclose wherein petitioners were denied any substantial right to which they were entitled either under the laws or the rules and regulations in such cases made and provided. It is now well settled that in the absence of such a showing the petition should be denied. *Chin Yow v. United States*, 208 U. S. 8. In this case the Court said:

“If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. These facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts open the merits of the case, whether those facts are proved or not. And by way of caution, we may add, that jurisdiction would not be established simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced.”

And in the more recent decision of this Court in the case of *Jeung Bock Hon v. White*, 258 Fed. 23, the Court, speaking through his Honor Morrow, C. J., held as follows:

“We can not say that the proceedings were manifestly unfair or that the actions of the executive officers were such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In such cases, the order of the executive officers within the authority of the statute is final.”

#### AS TO ABUSE OF DISCRETION

*Does ~~not~~ an inspection of the immigration records herein disclose a manifest abuse of discretion on the part of the Board of Special Inquiry or the Secretary of Labor?*

During the examination of the alleged father C. Wai Tong at Fresno, August 14, 1909, he was asked:

Q. Have you any documental evidence to support your claim of naturalization in the United States?

A. Yes, Sir.

(Presents certificate No. 711 issued by Immigration officer in charge, Honolulu, Hawaii, dated Jan. 17, 1911, to C. Wai Tong (Chang Hung Pui) age 55 yrs. naturalized citizen. Description and photograph tally with present holder. Endorsed and returned.)

Presents Record of Naturalization, Dept. of Interior, The Hawaiian Kingdom, dated July 19, 1892, signed C. N. Spencer, Minister of the Interior. Attached to record marked Exhibit 'A'. Presents certificate of registration of American Citizen, dated Aug. 3, 1907, signed Stuart J. Fuller, Vice and Deputy Consul Gen'l, Hong-kong, China, showing registration of applicant's name on this document as a son of registrant. Attached to record and marked exhibit 'B' (Presents certificates of naturalization signed by Henry E. Cooper, Secretary of the Territory of Hawaii, dated Honolulu, Dec. 14th, 1900. Photograph attached is a correct likeness of the witness, Chang Wai Tong. Attached to record and marked exhibit 'C'. Note. Witness requests that exhibits A. B and C be returned to him when they have served their purpose.)

The documentary evidence submitted by the witness will be found in respondent's Exhibit C herein, as follows:

Exhibit "A", Record of Naturalization, page 14,  
Exhibit "B", Certificate of Registration, page 13,

Exhibit "C", Certified copy of Certificate of Naturalization, pages 12 and 11.

The last named exhibit bears the following endorsement on the face thereof:

"Landed at Manila, P. I.

Per S. S. "Tean"

June 22, 1906,

As a citizen of the United States of America  
Chinese Board Report No. 594."

And on the reverse side of the second page of said exhibit (Exhibit C, p. 11) appears the following endorsement:

“Exhibit 14  
Chinese Board Report  
No. 594  
With wife and family  
Cases 15, 16, 17 and 18.”

This last mentioned endorsement was called to the attention of the witness October 6, 1919, and he was asked to explain the same.

Q. You certify that you were the passenger referred to by report No. 594, of the Chinese Board at Manila?

A. Yes.

Q. On the reverse side of this certificate your attention is invited to the stamp and notation, marked Exhibit 14, Chinese Board report, No. 594, which states that the passenger referred to is accompanied by “wife and family” cases 15, 16, 17 and 18? In view of the fact that you have positively asserted that you were traveling alone on that trip, what have you to state relative to this documental evidence that your wife and two children accompanied you?

A. As I said, I was traveling alone, but after leaving Hongkong, I made the acquaintance of three Chinese actresses who were on the steamer going to Manila. They had an engagement there to appear for two months at a Chinese theatre in Manila. The purser of the ship either of his



own accord, or at the suggestion of these actresses, and without my permission or knowledge, put their names on the manifest as my wife and two daughters. They were in fact a mother and her two daughters, all actresses, but I did not know anything about what was going on until after we arrived at Manila and I was surprised to hear them tell the Chinese Board that I was their husband and father. I did not want to embarrass them by saying that they were nothing to me and allowed the deception to go. They were entitled to admission as actresses, but they feared they might be held up until they were investigated to determine whether they were bad women and for that reason wanted to appear as my wife and daughters. They were admitted, and played at the theatre for two months in Manila and then returned immediately to China. No harm was done to anyone, and I did not feel that I was violating any law by allowing them to tell that they were my wife and daughters. I saw them several times afterwards at the theatre where they were playing and told them that they might have gotten me in trouble by saying they were my wife and daughters. They said that they had missed the last steamer and they had to be at the theatre the next day after they were admitted and had their admission been delayed they would have been violating their contract. They were highly respectable women, but three women traveling alone in the business they were in might be under suspicion of being immoral persons, and they simply wanted the protection of appearing as my wife and daughters.

Q. Did you know these women prior to leaving Hongkong?

A. No, never saw them that I know of before I saw them on the steamer some hours out from Hongkong.

Q. Was there any monetary consideration for the part you played in their admission to the Philippine Islands from China?

A. No.

Q. Were they Chinese women and of the Chinese race?

A. Yes.

Q. Did you make a statement to the Chinese Board at Manila at the time of your examination that they were your wife and daughters?

A. No, but I was in the room when they told that to the inspectors.

Q. Did you make any effort to apprise the authorities that they were imposters and not members of your family?

A. No. I said nothing, I did not want to make any trouble for them.

In the meantime the Collector of Customs at Manila, P. I., was requested to furnish all records pertaining to the landing of said C. Wai Tong at Manila in 1906 (Exhibit A, p. 59).

In response the Insular Collector of Customs at Manila, under cover of his letter of December 2, 1919, forwarded to the Commissioner of Immigration a copy of the complete record of the investi-

gation made by the Board of Special Inquiry which landed these persons. (Exhibit C, pp. 1 to 10.)

While the witness now claims that he did not answer any questions at that time but was merely a passive participant in those proceedings, the record shows that he not only was a witness in behalf of the four women landed as his wife and daughters, but that the alleged wife and one Charles Chong, a theatrical manager, also testified as to the family relationship.

“That, in the examination of Chang Wai Tong, age 43, we find that he is coming from Canton. He presents a certificate of residence No. 403, issued by the Collector of Internal Revenue, District of Hawaii, dated February 14, 1901, to Chang Wai Tong, a merchant, residing at Nunana Street, Honolulu. He further presents a copy of a record of naturalization, representing that one Chang Wai Tong, having made application in due form to the Minister of the Interior, was admitted and declared to be a citizen of the Hawaiian Kingdom on July 19, 1892. Attached to said copy, there is a certificate signed by the Secretary of the Territory of Hawaii, dated December 14, 1900, representing that the aforesaid copy of the record of naturalization of Chang Wai Tong is a true and correct copy of same, as shown by the records of his office. Said Chang Wai Tong, states that he is the same identical Chang Wai Tong mentioned and described in the aforesaid documents, and that he is now coming to Manila for the purpose of

assisting in the management of the aforesaid theatrical company.

“We decide that the said Chang Wai Tong is a citizen of the United States, and we, therefore, recommend that he be permitted to land.

“15, 16, 17, and 18. That, in the examination of Chao Ng, female, age 34; Chang Fong, female, age 18; Chang Chee, female, age 14, and Chang Cao, female, age 9, we find that they are coming from Canton, in company with the aforesaid Chang Wai Tong, who claims them as his legitimate wife and minor children respectively. They present no papers. Said Chao Ng states that she is the wife of the said Chang Wai Tong, and that she is an actress by occupation. She further states that the said girls, Chang Chee and Chang Cao, are her daughters, and the legitimate minor children of said Chang Wai Tong. She also states that the said Chang Fong is her stepdaughter, and the legitimate minor child of the said Chang Wai Tong, her husband, by his first wife. Said Chan Wai Tong testifies that the said Chao Ng is his legitimate wife; that the said Chang Fong is his legitimate daughter by his first wife, now deceased, and that the said Chang Chee and Chang Cao are his legitimate minor children by his second wife, the aforesaid Chao Ng. He further testifies that all of his family will take part in the aforementioned Chinese theatrical company. Charles A. Chong, manager of the “Nai Chu Cuan’ theatrical company, age 25, No. 2 Calle Ugalde, testifies that he has been acquainted with the said Chang Wai Tong for the past twenty years; that the said Chang Fong is the

legitimate daughter of the said Chang Wai Tong by his first wife, now deceased, and that the said Chao Ng, who has been married to the said Chang Wai Tong for the past sixteen years, is the only legitimate living wife of the said Chang Wai Tong, and that the said girls, Chang Chee and Chang Cao are their legitimate minor children.

“We decide that the said Chao Ng is the legitimate wife of the said Chang Wai Tong, and that the said girls, Chang Fong, Chang Chee, and Chang Cao, are their legitimate minor children, and that the said Chang Wai Tong is a citizen of the United States, and we, therefore, recommend that they be permitted to land as the legitimate wife and minor children of a citizen of the United States.”

C. Wai Tong now claims that he has been married twice first to Jow Shee February 26, 1876, who died about a year later leaving no children; that he was married to Leong Shee February 17, 1880, by whom he had three boys and one girl, Chang Shee; that the daughter is dead and gives the names, dates and places of the sons' births as follows:

Chang Yat, born KS 13-11-24 (Jan. 7, 1888) in China.

Chang Sim, born KS 20-8-2 (September 1, 1894), in China.

Chang Mee, born KS 30-1-9 (February 28, 1904), in China. (Exhibit A, p. 19.)

We first find this witness applying for admission at Manila with a women and three Chinese girls,



who it was there claimed were his lawful wife and daughters. He is now attempting to bring into the United States the appellants herein and tells altogether a different story concerning his marriage and his family. Here we have positive contradictions in the testimony of the witness in respect to facts of time, place and relationship, concerning which the witness can not be presumed to be mistaken and which appear to have been deliberately, knowingly and falsely made with intent to deceive.

No reasonable or satisfactory explanation has been offered, although ample opportunity was afforded the witness to do so, he having been confronted with all of his previous statements.

In such a case as this we believe that the rule "*falsus in uno, falsus in omnibus*" should be applied.

In the case of *The Santissima Trinidad and The St. Ander* (7 Wheat. 283; 5 L. ed. 454-468) the United States Supreme Court, speaking through his Honor, Justice Story, says:

"It has been said that if witnesses concur in proof of a material fact, they ought to be believed in respect to that fact, whatever may be the other contradictions in their testimony. That position may be true under circumstances; but it is a doctrine which can be received only under many qualifications, and with great caution. If the circumstances respecting which the testimony is discordant be immaterial, and of

such a nature that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind, rather than from deliberate error. But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply the maxim '*falsus in uno, falsus in omnibus*'. What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood? The contradictions in the testimony of the witnesses of the libelants have been exposed at the bar with great force and accuracy; that they are so numerous that, in ordinary cases, no court of justice could venture to rely on it without danger of being betrayed into the grossest errors."

Citizenship is a priceless heritage which is not to be bestowed upon one seeking to enter the United States for the first time without some competent and convincing proof of that fact. Something more than a mere declaration of citizenship should be required. Were the Board of Special Inquiry, and the Secretary of Labor compelled to accept such

testimony as being satisfactory? Is the evidence so positive or clear as to carry conviction to an unprejudiced mind? Does it not bear the earmarks of suspicion as to its truth? These questions are best answered by the opinion of this court in the case of *Lee Sing Far vs. United States*, 94 Fed. 834, wherein the court, speaking through his Honor, Hawley, District Judge, pages 836 and 837, says:

“The question which we are called upon to decide is not whether there was any evidence tending to establish the fact that appellant was born in the United States, but is whether the evidence is so clear and satisfactory upon that point as to authorize this court to say that the court erred in refusing her to land, and in entering judgment that she be remanded. From the testimony it appears that appellant is of Chinese parentage. She has been in China, with her mother, for 17 years. In such a case it cannot be said that any presumption arises that she was born in the United States. It, therefore, devolves upon her to prove to the satisfaction of the court that she was born in this country. It does not necessarily follow that, because four witnesses have testified positively that she was born in San Francisco, there being no witness to the contrary, their statements upon this question must be accepted as true. If such a rule were adopted and followed, there would be no more Chinese remanded in such cases. It is safe to say that the United States is powerless to make any proof in any case as to the place of birth of Chinese children. In the very nature of the case it would, as a general rule, be im-

possible to do so. The only protection to the government, in the enforcement of the exclusion act in this character of cases, lies in the cross-examination of each witness, on behalf of the petitioner, whereby the 'crucial test' of his credibility may be applied. It may or may not always be successful; but it has often been said to be one of the most efficacious tests which the law has devised for the discovery of truth.

"If, from the whole testimony, the court is not satisfied that the witnesses have told the truth, it has the right to exclude their testimony, and remand the petitioner, because the evidence offered is insufficient to convince the mind of the court that the petitioner is entitled to land in the United States."

In *Quock Ting vs. U. S.*, 140 U. S. 417, 420, 11 Sup. Ct. 733, 851, the court said:

"Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to ma-

aterial facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

It is urged by counsel for petitioner that the introduction of the report of the Board of Special Inquiry at the hearing at Manila, P. I., renders the hearings herein unfair and the competency of this unauthenticated copy of said record is also questioned.

We believe that it is now well settled by the decisions of this Court and those of other circuits as well as those of the United States Supreme Court that hearings before the Immigration officials are not governed by the strict rules of evidence that pertain to judicial proceedings.

*Healy v. Backus*, 221 Fed. 358 (C. C. A. 9);  
*Choy Gum v. Backus*, 223 Fed. 487 (C. C. A. 9).

In the latter case the Court, speaking through his Honor Wolverton, District Judge, says:

"This kind of testimony, while not ordinarily competent for judicial inquiry in the sense of a trial in a court of justice, has nevertheless been resorted to before executive officers and boards of immigration inspectors for determining the right of aliens to remain in this country, and yet the aliens have been refused their liberty upon habeas corpus, where the inquiry appeared to be fair and impartial, and where the immigration officials had been guilty of no



abuse of discretion reposed in them. Such a case was *Healy v. Backus*, Commissioner of Immigration, 221 Fed. 358, recently decided by this Court. In that case many affidavits were taken and admitted, both for and against the petitioner, and a very wide range of inquiry was indulged in by which information was gathered by means of letters and reports, and yet the Court was of the view that the inquiry was fairly conducted toward the aliens whom Healy represented, and without abuse of discretion on the part of the immigration officers, and consequently refused to liberate them upon habeas corpus; there being pertinent testimony adduced from which the finding made could be reasonably inferred. To the same purpose are also the recently decided cases of *White v. Gregory*, 213 Fed. 768, 130 C. C. A. 282, in this court, and *United States v. Uhl*, 215 Fed. 573, 131 C. C. A. 641, in the Circuit Court of Appeals for the Second Circuit."

In the more recent case of *Morrell v. Baker*, 270 Fed. 577, decided in the Second Circuit, in a *Per Curiam* decision, the Court held as follows:

"*PER CURIAM.* Hearings before administrative bodies, like the immigration authorities, are not subject to the rules governing judicial proceedings. The alien must be given a fair hearing, but the hearing may be summary. Hearsay evidence is admissible, and the findings of fact by the commissioners conclusive, if there is any evidence to support them. In *re Diamond* (C. C. A.), 266 Fed. 34; In *re Rakies* (C. C. A.), 266 Fed. 646.

“In this case the alien had a fair trial, and there was evidence to support the finding that he had imported a woman for immoral purposes, and, that finding being binding upon us, the appeal is dismissed.”

And again in the case of *Sibray v. United States*, 227 Fed. 1, 7, decided by the Circuit Court of Appeals for the Third Circuit, the Court, says:

“The act of 1907 contemplates a summary investigation, and not a judicial trial, and while an alien’s right to be heard must be respected, and the discretion of the officials must not be abused, the formalities of procedure and the rules governing the admissibility of evidence have been much relaxed. *U. S. v. Uhl* (C. C. A., 2d Cir.), 215 Fed. 573, 131 C. C. A. 641; *Choy Gum v. Backus* (C. C. A., 9th Cir.), 223 Fed. 492,—C. C. A.—. We do not find anything fatally erroneous in the present record. The alien had counsel from the beginning, and had the opportunity to call such witnesses as he wished or was able to produce.”

In the case of *Tang Tun v. Edsell*, 223 U. S. 673; 56 L. ed. 606, it was there held that the report of the examining inspector, who inspected various records relating to the applicant for admission, was competent and admissible unless it was shown that said report was false or made to deceive the Secretary. In this case the Court says:

“And it will be observed that it is not shown that the statements of the inspector, of which complaint is made, were false, or that there

was any attempt to deceive the Secretary.

\* \* \* ”

“Complaint is also made of the action of the inspector in forwarding to the Secretary the papers in the cases of other Chinese persons who arrived on the steamer ‘Tacoma’ with Tang Tun on April 10, 1897, some of whom had identification papers similar to those of Tang Tun, with the indorsement of the collector, purporting to show their admission, in conflict with the office records. The inspector called attention to the fact that, in certain cases, after inquiry before the United States Commissioner, and despite the possession of such identification papers, deportation had been ordered, and also that it appeared that all the applicants described in the papers forwarded to the Secretary had been held in British Columbia pending decision. The contents of these papers are not printed in the transcript of record, but we must assume from the description that they were from the official files. Of these the Secretary might at all times take cognizance, and it would be extraordinary indeed to impute bad faith or improper conduct to the executive officers because they examined the records or acquainted themselves with former official action.”

“The record fails to show that their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law. And, this being so, the merits of the case were not open to judicial examination.”

“As the District Court took jurisdiction and then proceeded to determine the merits, sus-

taining Tang Tun's claim of citizenship, the respondent was entitled to carry the entire case to the Circuit Court of Appeals. *United States v. Jahn*, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 407, 48 L. ed. 496, 499, 24 Sup. Ct. Rep. 376; *United States v. Ju Toy*, 198 U. S. 253, 259, 49 L. ed. 1040, 1042, 25 Sup. Ct. Rep. 644. And the judgment of that court, reversing the decision of the District Court, and directing the dismissal of the proceedings, was right.

“Judgment affirmed.”

There are other discrepancies and contradictions in the records which are pointed out in the memorandum of the Acting Secretary heretofore referred to.

It does not necessarily follow that because the citizenship of the alleged father C. Wai Tong is conceded, that the appellants herein are also citizens of the United States and therefore entitled to admission as such.

The record shows that the alleged father was born in China, November 20, 1857 (Exhibit A, p. 20), and that Chang Yet and Chang Sim were also born in China in KS 13-11-24 (January 7, 1888) and KS 20-8-2 (September 1, 1894), respectively (Exhibit A, p. 19).

It further appears from the records that C. Wai Tong became a citizen of the Hawaiian Kingdom

by naturalization July 19, 1892 (Exhibit C, pp. 11 and 14).

The annexation of Hawaii was followed by the enactment of the law of April 30, 1900 (31 Stat. L. 141; Comp. Stat. 1918, Section 3647) Section 4 of which Act provides as follows:

*persons who were citizens of the*  
 “All ~~children heretofore born or hereafter~~  
*Ne* public of Hawaii on August 12, 1898, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii.”

Section 1993 of the Revised Statutes (Comp. Stat. 1918, Section 3947) provides as follows:

“All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States.”

It will be observed that neither of the appellants herein come within the provisions of either of the above quoted Acts.

The alleged father C. Wai Tong did not become a citizen of the United States until after the passage of the Act of April 30, 1900, and was not therefore a citizen of the United States at the time of the birth of either of the appellants herein, or, in other words, until Chang Yet, who was born in 1888, was twelve years of age and Chang Sim, who was born in 1894, was six years old.

This fact alone fully justifies the action of the



Acting Secretary in dismissing the appeal in these cases.

But because of the character of the evidence and the contradictions and discrepancies therein, the Board of Special Inquiry and the Secretary of Labor were called upon to exercise a discretion in the determination of the matter before them. In the exercise of this discretion they could have decided either in favor of or against the applicants, and there being some evidence in support of that decision, their reasons for so doing would not be subject to judicial review by the Court.

*Abuse Justifying Interference.*

“The ‘abuse of discretion’, to justify interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 Ind. A. 395; 62 N. E. 107-111.” 1 C. J., 372.

“The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. Abuse of discretion and especially gross and palpable abuse of discretion, which are terms ordinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 N. Y. 418, 431.” 1 C. J., 372.

“Difference in judicial opinion is not synonymous with abuse of judicial discretion. 62 N. J. L. 380, 383.” 1 C. J., 372.

This Court, speaking through his Honor, Morrow, C. J., in *White v. Gregory*, 213 Fed. 768-770, says:

“In reaching this conclusion the officers gave the aliens the hearing provided by the statute. This is as far as the Court can go in examining such proceedings. It will not inquire into the sufficiency of probative facts, or consider the reasons for the conclusions reached by the officers.”

In the recent case of *Jeung Bock Hong and Jeung Bock Ning v. White*, 258 Fed. 23, the Court, speaking through his Honor, Morrow, C. J., said:

“The discrepancies in the testimony appear to be unimportant but if taking them altogether the executive officers of the Department found that the evidence in support of the petitioner’s right to land and enter the United States was so impaired as to render it unsatisfactory, the Court is not authorized to reverse that conclusion.”

“We cannot say that the proceedings were manifestly unfair or that the actions of the executive officers were such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In such cases, the order of the executive officers within the authority of the statute is final.”

In *Low Wah Suey v. Backus*, 225 U. S. 460 (56 L. ed. 1167), the Court, speaking through Mr. Justice Day, says:

“A series of decisions in this Court has settled that such hearings before executive officers may be made conclusive when fairly conducted. *In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, IT MUST BE SHOWN THAT THE PROCEEDINGS WERE MANIFESTLY UNFAIR, THAT THE ACTION OF THE EXECUTIVE OFFICERS WAS SUCH AS TO PREVENT A FAIR INVESTIGATION, OR THAT THERE WAS A MANIFEST ABUSE OF THE DISCRETION COMMITTED TO THEM BY THE STATUTE.* In other cases the order of the executive officers within the authority of the statute is final. U. S. v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 225 Sup. Ct. Rep. 644; Chin Yow v. U. S., 208 U. S., 8 L. ed. 369, 28 Sup. Ct.”

We confidently urge and believe that the judgment of the lower court in this case should be affirmed.

Respectfully submitted,

JOHN T. WILLIAMS,

*United States Attorney,*

BEN F. GEIS,

*Assistant United States Attorney.*



No. 3696

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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CHANG SIM and CHANG YET,

*Appellants,*

VS.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

*Appellee.*

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REPLY BRIEF FOR APPELLANTS.

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## REPLY BRIEF FOR APPELLANTS.

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These cases were tried before the immigration authorities at the port of admission, the Secretary of Labor at Washington, and the District Court upon the theory that if the relationship were conceded to exist the citizenship or right of admission of these appellants to join their citizen father would follow as a natural consequence. However, upon pages 25 and 26 of appellee's reply brief the contention is advanced that this was an erroneous conclusion, and notwithstanding the citizenship of the father, it did not necessarily follow that his two sons were citizens or otherwise entitled to admission into the country to join their father. As this

injected a new element into the case upon which these appellants had not been heard, our argument before the court was addressed solely upon that point, and in pursuance with the premission given the following brief is submitted thereon.

The political status of Chang Wai Tong, or C. Wai Tong, the father of these appellants, is that he was born in China, was a citizen thereof and remained such until he became a naturalized subject of the Hawaiian Kingdom upon July 19, 1892 (Exhibit "C", pp. 11 and 14). Upon the overthrow of the Hawaiian Kingdom and the establishment of the republic he became a citizen of the Republic of Hawaii, and by virtue of the annexation of Hawaii under the act of April 30, 1900 (31 Stat. L. 141, Sec. 4), he became, and ever since has remained a citizen of the United States.

At the time of Chang Wai Tong's marriage both he and his wife were subjects of the Chinese Empire, and his wife has ever since, and does now, reside in China. Upon the birth of his first child, the appellant Chang Yet, both Chang Wai Tong and his wife were citizens of China, and the child having been born in China, he was undoubtedly a Chinese subject at his birth. The subsequent naturalization of the father made the father a subject of the Hawaiian Kingdom. It is also contended that this naturalization also made his wife a citizen of the Kingdom of Hawaii, even though she was residing in China; hence, when the appellant Chang

Sim, the second son, was born in China his father was already a naturalized subject of the Kingdom of Hawaii, and his mother, by virtue of that naturalization, was herself a citizen of the Kingdom of Hawaii; therefore, it is contended that at the time of Chang Sim's birth, as both of his parents were citizens of the Kingdom of Hawaii, that he takes the political status of his parents at the time of his birth, and hence became at birth a citizen of the Kingdom of Hawaii.

As to the elder son, appellant Chang Yet, it is contended that the change of allegiance of his father and mother from the Chinese Empire to the Kingdom of Hawaii during his infancy likewise changed his political status from that of a subject of China to a subject of the Hawaiian Kingdom. It is further contended that the political allegiance of this entire family changed from the Kingdom to the Republic of Hawaii upon the change of governments in that country. According to the terms of the annexation of the Hawaiian Islands as part and parcel of the United States, Congress provided in Section 4 of the said act as follows:

“All persons who were citizens of the Republic of Hawaii on August 12, 1898, are hereby declared to be citizens of the Territory of Hawaii.”

The attention of the court is directed to the fact that this Section 4 contains no limitation as to race, age, or place of residence, but provides that all persons who were citizens of the Republic of

Hawaii on August 12, 1898, are hereby declared to be citizens of the United States. At that time the appellant Chang Yet was a little over ten years of age, and Chang Sim was a little under four years of age, and it is contended that the absorption into the citizenship of the United States of all the then citizens of the Republic of Hawaii made Chang Wai Tong, his three minor children and their mother citizens of the United States.

On or about August 13, 1907, Chang Wai Tong appeared before the United States Consular representative at Hong Kong and there registered as an American citizen, and registered his wife, Leong Shee, and his three minor children, Chang Yet, then 20 years of age, Chang Sim, then 14 years of age, and Chang Mee, then 4 years of age, as citizens of the United States (see Exhibit "C", page 12). The two elder children are these two appellants.

That persons of the Chinese race who were citizens of the Republic of Hawaii thereafter and upon the annexation of the Hawaiian Islands by the United States of America, became as a result thereof citizens of the United States, has been variously upheld; see "Opinions of Attorneys General", Volume 23, page 345, and also page 352, wherein this is upheld by the then Attorney General, John W. Griggs; also see from the same volume, pages 509 and 511, where the same position is upheld by the then Attorney General, Philander C. Knox. The leading case upon this point is that decided in the



United States District Court of Hawaii on August 13, 1901, reported in Estee's Reports, U. S. District Court of Hawaii, Volume 1, page 118, in *U. S. v. Ching Tai Sai* and *U. S. v. Ching Tai Sun*, wherein the learned district judge, Morris M. Estee, held in favor of their American citizenship.

By reference to the Civil Laws of Hawaii, published in 1897, which is not a separate enactment, but is a compilation of the then existing laws, including the Constitution of the Republic of Hawaii, we find the following provisions which are important to this case. On page 6 is contained Article 17 of the Constitution on citizenship, Section 1 being as follows:

“All persons born or naturalized in the Hawaiian Islands, and subject to the jurisdiction of the republic are citizens thereof.”

Judge Estee, in his decision in the cases mentioned above, states with respect to this section of the Constitution as follows:

“In arriving at an interpretation of the above section of the Constitution of the Republic of Hawaii we are aided by the construction given to the Constitution of the United States which has a provision in almost the exact terms of that of the Constitution of Hawaii, namely—the Fourteenth Amendment. \* \* \*”

By reference to page 447 of the Civil Laws of Hawaii we find Sections 1109 and 1110, which have a material bearing upon the point here involved. The sections follow:

“1109. The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage, provided, however that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws.

“1110. The several Courts of Record shall have power to decide for themselves the constitutionality and binding effect of any law, ordinance, order or decree, enacted or put forth by the President, the Legislature, the Cabinet, or any executive board or bureau of the Government. The Supreme Court shall have the power to declare null and void any such law, ordinance, order or decree as may, upon mature deliberation, appear to it to be contrary to the Constitution, or opposed to the law of Nations, or any existing treaty with a foreign power; provided, that such decision shall be rendered in open court after the parties interested shall have had an opportunity to be heard thereon.”

It will be noted that under the first section the *common law* of England as ascertained by English and American decisions is declared to be the common law of the Hawaiian Islands, and further, in the second section that the Supreme Court of the Hawaiian Islands shall have power to declare null and void any such law, ordinance order or decree as might be contrary to the Constitution, “*or opposed to the law of Nations*”.

It is the Government's contention in these cases that there is no equivalent in the Hawaiian laws to Section 1993 of our Revised Statutes, which is as follows:

“All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States”,

and that hence these appellants are not citizens of the United States. We call attention to the fact that Section 1993 of the Revised Statutes was but a revision of the earlier law upon that subject, and refer to the act of Congress of March 26, 1790, ch. 3 (1 Stat. L. 103), the third subdivision having to do with the foreign born children of American citizens, wherein it is legislated as follows:

“The children of citizens of the United States that may be born beyond sea, or out of the limits of the United States, shall be considered as natural-born citizens; provided that the right of citizenship shall not descend to persons whose fathers have never been resident in the United States.”

Five years later by the act of January 29, 1795, ch. 20 (1 Stat. L. 414), this was amended as follows:

“The children of citizens of the United States that may be born out of the limits and jurisdiction of the United States, shall be considered as natural-born citizens; provided, that the right

of citizenship shall not descend to persons whose fathers have never been resident in the United States”,

and Congress again, seven years later, by the act of April 14, 1802, ch. 28 (2 Stat. L. 155), Section 4, legislated as follows:

“The children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the said states under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States; and the children of persons who now are, or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States; provided, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States.”

Appellants contend that the principle of law set forth in the enactments of 1790, 1795, 1802, and the Revised Statutes of 1855, was but the placing and continuing upon our statute books of a well and clearly defined principle of the common law as the same had developed and been changed up to the time of the establishing of our country, and also the law of Nations, that a minor child shall take the citizenship of its father, which doctrine also, of course, applied to the wife, whose political status is always regarded as that of her husband.



The development of the ruling law of England upon this subject is thusly set forth in *Blackstone*, Book 1. page 373, Section 505-6, British Subjects Born Abroad, from which I quote as follows:

“\* \* \* To encourage, also, foreign commerce, it was enacted by statute 25 Edw. III, st. 2 (British Subject, 1350), that all children, born abroad, provided *both* their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband’s consent, might inherit as if born in England: and accordingly it hath been so adjudged in behalf of merchants. But by several more modern statutes these restrictions are still further taken off: so that all children born out of the king’s ligeance, whose *fathers* (or grandfathers by the father’s side) were natural-born subjects, are now deemed to be natural-born subjects themselves, to all intents and purposes; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were at birth of such children in the service of a prince at enmity with Great Britain. \* \* \*”

The English law upon the question is most ably expounded by Mr. Justice Gray in the case of *U. S. v. Wong Kim Ark* (169 U. S. 649; 18 Sup. Ct. 456), where, on page 465 of the Supreme Court edition, it is held as follows:

“It has been pertinently observed that, if the statute of Edward III, had only been declaratory of the common law, the subsequent legislation on the subject would have been wholly unnecessary. Cockb. Nat. 9. By the statute of 29 Car. II (1677) c. 6, 1, entitled ‘An act for the naturalization of children of his majesty’s subjects born in foreign countries during the late troubles,’ all persons who at



any time between June 14, 1641, and March 24, 1660, 'were born out of his majesty's dominions, and whose fathers or mothers were natural-born subjects of this realm,' were declared to be natural-born subjects. By the statute of 7 Anne (1708) c. 5, 3, 'the children of all natural-born subjects, born out of the ligeance of her majesty, her heirs and successors,'—explained by the statute of 4 Geo. II (1731) c. 21, to mean all children born out of the ligeance of the crown of England, 'whose fathers were or shall be natural-born subjects of the crown of England, or of Great Britain, at the time of the birth of such children respectively,' 'shall be deemed, adjudged and taken to be natural-born subjects of this kingdom, to all intents, constructions and purposes whatsoever.' The statute was limited to foreign-born children of natural-born subjects; and was extended by statute of 13 Geo. III (1773) c. 21, to foreign-born grandchildren of natural-born subjects, but not to the issue of such grandchildren; or, as put by Mr. Dicey, 'British nationality does not pass by descent or inheritance beyond the second generation.' See *De Geer v. Stone*, above cited; Dicey, *Confl. Laws*, 742."

Mr. Justice Gray begins the preceding paragraph as follows:

"It has sometimes been suggested that this general provision of the statute of 25 Edw. III was declaratory of the common law. See Bacon, *arguendo*, in *Calvin's Case*, 2 How. St. Tr. 585; Westlake and Pollock, *arguendo*, in *De Geer v. Stone*, 22 Ch. Div. 243, 247; 2 Kent, Comm. 50, 53; *Lynch v. Clarke*, 1 Sandf. Ch. 583, 659, 660; *Ludlam v. Ludlam*, 26 N. Y. 356. \* \* \*"

Thus showing that there is worthy and weighty suggestion that even in the ancient common law

there was reason to believe that in the time of Edward III it was recognized as a principle that the foreign-born child of a citizen took his father's political status. Certainly there can be no questioning the fact that it was a clearly and well defined principle of the English common law as the same had been interpreted by the decisions of English and American courts, and as the laws themselves had progressed up to the time when these two Hawaiian statutes were enacted in 1892, that it was well recognized as the fundamental law of England and the United States that the political status of the foreign-born child followed that of his father.

Now Sections 1109 and 1110 of the Civil Laws of Hawaii hold in force both the common law and the law of Nations. By the common law was not meant the ancient *common law*, but, on the contrary, the common law as developed, modified, changed and added to by the subsequent statutory enactments and English and American decisions which were declared to be the common law of the Hawaiian Islands in all cases except as otherwise expressly provided in the laws of Hawaii. These two sections of the Civil Laws were adopted in 1892 and, of course, had reference to the then existing common law, and international law. The common law of England and the United States had both progressed and developed up to the time in question to the point of recognizing the fact that birth gave the absolute right of citizenship in the person to the country where the birth took place, but it was funda-

mental in both countries that the foreign-born son of a citizen of England, as well as of the United States, was by the then existing law deemed to be a citizen by birth of his father's country. It is quite true that both countries recognized the right of the foreign country wherein the birth took place to consider such a person a native born citizen of that country, but none the less it is fundamental in both English and American law that those two countries recognize the foreign born son as a citizen and subject of the father's country, irrespective of where he was born. The leading case upon this subject is that of *U. S. v. Wong Kim Ark* (169 U. S. 649; 18 Sup. Ct. 456), where, in a wonderfully exhaustive opinion by Mr. Justice Gray is collated many of the decisions of our own courts, as well as the courts of England upon this point.

That foreign born sons of citizens of the United States are themselves citizens thereof has been upheld in the cases, *Ex parte Ng Do Wong* (230 Fed. 751), *Ex parte Wong Foo* (230 Fed. 534), *Ex parte Lee Dung Moo* (230 Fed. 746). The Government did not appeal from these decisions, but caused the matter to be referred to the Hon. T. W. Gregory, the then Attorney General of the United States, and in his opinion, which is dated April 27, 1906, which was given in the matter of *Wong Gim Toon* and *Wong Shing Gim*, he reached the same conclusion. His opinion is remarkably instructive as it covers the whole point involved in this case. He draws upon many of the leading authorities upon interna-

tional law, and other court decisions. The Circuit Court of Appeals for the Ninth Circuit, in the case of *Quan Hing Sun* (254 Fed. 402), likewise upholds the American citizenship of such foreign born Chinese. That this is the law of the United States admits of no question, and it is also the law of England, and was the law of both countries at the time not only of the adoption of the two sections of the Civil Laws of Hawaii herein mentioned, but also at the time of the adoption of the Constitution of the Kingdom of Hawaii. In *2 Corpus Juris*, 779, it is provided as follows:

“(8) C. By Parentage—1. Children of Citizens—a. In General. The foreign born children of a citizen are themselves citizens. This is the rule not only in the United States where it is expressly provided by statute that all children born out of the limits or jurisdiction of the United States, whose fathers at the time of their birth are citizens thereof, are citizens of the United States, provided that the right of citizenship shall not descend to children whose fathers never resided in the United States, but also in England and some other countries. In the application of this rule it is wholly immaterial whether the parents are citizens by birth or naturalized citizens. \* \* \*”

The muchly cited case of *Ware v. Wisner* (50 Fed. 310) is authority for the proposition 'that children born abroad whose fathers were at the time of their birth citizens are themselves of the United States. Further upon this point is the case of *Buckley v. McDonald* (33 Mont. 483; 84 Pac. 1114). In Vol. 13, Opinions Attorneys General,



page 89, it is held with respect to foreign born children of citizens that such children are entitled to all the privileges of citizenship but if by the laws of the country of their birth they are subject to its government it is not competent to the United States to interfere with that relation while they continue within the territory of that country or to change the relation to other foreign nations which, by reason of their place of birth, may at the time exist.

The same view as above set forth has also been repeatedly maintained by the British Government, as set forth in said opinion of Mr. Justice Gray in the *Wong Kim Ark* case.

What may have been the exact question here involved was presented to Attorney General John W. Griggs, and was covered by him in the first opinion hereinbefore mentioned, Vol. 23, Opinions Attorneys General, page 345, wherein he states the question as follows:

“1. Whether a person born in the Hawaiian Islands in 1885 of Chinese parents, who are laborers, and taken to China with his mother in 1890, is entitled to re-enter the Territory of Hawaii, where his father still resides?

“2. Whether the wife and children of a Chinese person, who was naturalized in 1887 in Hawaii and still resides there, are entitled to enter that Territory ‘by virtue of the citizenship’ of the husband and father?

In the first case the Chinese person claims the right to enter the Territory of Hawaii because he is a citizen of the United States and of the



Territory of Hawaii by reason of his birth in that territory; and in the second case the Chinese persons claim the same right because the husband and father is a citizen of the United States and of the Territory of Hawaii by force of his naturalization under Hawaiian laws. The exact question, then, upon which I have the honor to deliver to you my opinion is, whether a Chinese person, born or naturalized in the Hawaiian Islands prior to the annexation of that territory, is a citizen of the United States; for \* \* \* I conceive that there can be no doubt under existing law of the right of a citizen of the United States and of his wife and children to enter freely the Territory of Hawaii",

and he thusly disposed of the matter.

In finally submitting this point to the consideration of the court I am firmly convinced of the soundness of the legal proposition that the elder of these two appellants, Chang Yet, though born a citizen of China, became with his father's naturalization as a subject of the Kingdom of Hawaii a subject of that Kingdom, he still being a child of tender years living in his father's house. The naturalization of the husband undoubtedly made his wife a citizen of the Kingdom of Hawaii. Our court decisions upon that point are absolutely controlling and admit of no question. The wife was a person who could have been herself naturalized in that country. Our decisions upon that point are *Kelly v. Owen* (7 Wall. 496; 19 U. S. 283); *Hopkins v. Fachant* (130 Fed. 839; 65 C. C. A. 1); *In re Nicola* (184 Fed. 322; 106 C. C. A. 464); *Leonard v.*

*Grant* (5 Fed. 11); *U. S. v. Kellar* (13 Fed. 82); *In re Langtry* (31 Fed. 880); *In re Rionda* (164 Fed. 368); *U. S. v. Cohen* (179 Fed. 834); *Mackenzie v. Hare* (239 U. S. 299; 36 Sup. Ct. 106).

From these decisions there is no question to the fact at all that the naturalization of the husband was likewise the naturalization of the wife, and that she became by such naturalization a citizen of the Kingdom of Hawaii. We, therefore, have the condition, that when the younger of these appellants, Chang Sim, was born his parents were both citizens of the Kingdom of Hawaii. It is, therefore, contended that he became by birth a citizen of the Kingdom of Hawaii, and that the change of the government of Hawaii from that of a constitutional monarchy to a republic did not change, but continued in force the Hawaiian citizenship of all of the members of this family. These children were all minors when Hawaii was annexed to the United States, and by the terms of that annexation all the persons who were citizens of the Territory of Hawaii, no matter where resident, were absorbed into and made citizens of the United States, and hence we feel positive that they are all such citizens and entitled to admission into this government, and the act of the father in registering his wife and three minor children as citizens before the United States Consular Representative at Hong Kong on August 13, 1907, when all of these children were yet in their minority, was but in furtherance of his rights as an American citizen for the protec-

tion of himself and the members of his family to place them within the protection of the government of which they were all citizens.

It is, therefore, respectfully submitted that the points herein urged as to the citizenship of these appellants be upheld.

Dated, San Francisco,  
November 12, 1921.

Respectfully submitted,

GEO. A. MCGOWAN,

*Attorney for Appellants.*



IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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CHANG SIM and CHANG YET,  
*Appellants,*  
VS.

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Immigration for the Port of San Fran-  
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*Appellee.*

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## REPLY BRIEF FOR APPELLEE

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JOHN T. WILLIAMS,  
*United States Attorney,*

BEN F. GEIS,  
*Assistant United States Attorney,*  
*Attorneys for Appellee.*





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## REPLY BRIEF FOR APPELLEE

The appellants herein are applicants for admission at the Port of San Francisco as citizens of the United States, claiming to be the foreign-born sons of C. Wai Tong, whose citizenship is conceded.

The burden of proof in this case, like all others, is upon appellants.

C. Wai Tong, the alleged father, was born in China November 20, 1857, and became a naturalized subject of the Kingdom of Hawaii July 19, 1892,

and, being a citizen of the Republic of Hawaii, on the 12th day of August, 1898, he became a citizen of the United States under the Act of April 30, 1900.

The appellant Chang Sim was born in China September 1, 1894, and Chang Yet was also born in China January 7, 1888.

As the alleged father did not become a citizen of the United States until April 30, 1900, and both appellants were born before that date, neither can claim citizenship under the provisions of Section 1993 of the Revised Statutes which provide: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States." The Act of April 30, 1900, provides: "All persons who were citizens of the Republic of Hawaii on August 12, 1898, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii."

As the alleged father C. Wai Tong was not a citizen of the United States at the time of the birth of either of the appellants, they can not claim citizenship under Section 1993 of the Revised Statutes.

The question naturally follows were the appellants, by reason of the naturalization of their alleged father, citizens of the Republic of Hawaii on the 12th day of August, 1898, and therefore citizens of the United States under the Act of April 30, 1900.

It is contended by counsel for petitioners that upon the naturalization of the alleged father in Hawaii in 1892, his wife and minor sons, *ipso facto*, became citizens of Hawaii, although none of them, so far as the record shows, ever lived in Hawaii.

We have made a careful search of all available Hawaiian laws and fail to find anything in support of appellants' contention.

Our own naturalization laws provide that the children of persons duly naturalized under any of the laws of the United States, being under the age of twenty-one years at the time of their parents being so naturalized, shall, if dwelling in the United States, be considered as citizens of the United States (R. S. 2172). As neither appellant was dwelling in Hawaii at the time their alleged father was naturalized and have never lived there, they could not claim Hawaiian citizenship even though Hawaii had a statute similar in all respects to the section just before quoted; but, so far as we have been able to ascertain, there was never such a law in Hawaii.

Article VIII of the revised laws of the Kingdom of Hawaii, after prescribing the qualifications of persons entitled to naturalization and prescribing the oath to be taken, provides in part as follows:

“432. Every foreigner so naturalized, shall be deemed to all intents and purposes a native of the Hawaiian Islands, be amenable only to the laws of this Kingdom, and to the authority and control thereof, be entitled to the protection

of said laws, and be no longer amenable to his native sovereign while residing in this Kingdom, nor entitled to resort to his native country for protection or intervention. He shall be amenable, for every such resort, to the pains and penalties annexed to rebellion by the Criminal Code. And every foreigner so naturalized, shall be entitled to all the rights, privileges and immunities of an Hawaiian subject."

(Revised Laws of Hawaii 1884, Page 105.)

From this it appears that such naturalized persons were to be deemed natives or subjects of Hawaii "while residing in the Kingdom." This being the case, we fail to see how by any rule or fiction of law the wife and children of a naturalized subject of that Kingdom, who themselves never have resided in the Kingdom, can be regarded as natives or subjects of that Kingdom.

The constitution of the Republic of Hawaii adopted July 3, 1894, is in part as follows:

"Article 17.—Citizenship.

"Section 1. All persons born or naturalized in the Hawaiian Islands, and subject to the jurisdiction of the Republic, are citizens thereof."

"Article 18.—Naturalization.

"Section 1. The Naturalization of Aliens shall be exclusively within the jurisdiction of the Justices of the Supreme Court.

The procedure shall be such as may be provided by law.



Section 2. An alien may be admitted to citizenship upon the following conditions, viz:

1. He shall have resided in the Hawaiian Islands for not less than two years.

2. He must intend to become a permanent citizen of the republic.

3. He shall be able understandingly to read, write and speak the English language.

4. He shall be able intelligently to explain, in his own words, in the English language, the general meaning and intent of any article or articles of this Constitution.

5. He shall be a citizen or subject of a country having express treaty stipulations with the Republic of Hawaii concerning naturalization.

6. He shall be of good moral character and not a refugee from justice.

7. He shall be engaged in some lawful business or employment or have some other lawful means of support.

8. He shall be the owner in his own right of property in the Republic of the value of not less than Two Hundred Dollars over and above all encumbrances.

9. He shall have taken the oath prescribed in Article 101 of this Constitution and an oath abjuring allegiance to the Government of his native land or that under which he has heretofore been naturalized, and of allegiance to the Republic of Hawaii.

10. He shall make written application, verified by oath, to a Justice of the Supreme Court, setting forth his possession of and compliance

with all of the foregoing qualifications and requirements, and shall prove the same to the satisfaction of such Justice.”

(Fundamental Law of Hawaii,” Page 205-206.)

We find nothing in the above which can be construed in any manner as supporting the contention of counsel for petitioners that appellants herein were citizens of either the Kingdom or the Republic of Hawaii. On Page 6 of appellants’ reply brief there is quoted Sections 1109 and 1110 of the Civil laws of Hawaii published in 1897.

Section 1109 provides that “the common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution or laws or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage  
\* \* \*.”

We do not agree with counsel for appellants in his interpretation of what constitutes the common law. It is claimed by him that the various statutes, both of England and the United States, conferring citizenship upon children born abroad, are to be considered as a part of the common law. A definition of the common law, as we interpret it, is found in the case of *Western Union Telegraph Company vs. Call Publishing Company*, 181 U. S. 92-102, 45 L. ed. 765-770. In that case the Court, speaking through his Honor Mr. Justice Brewer, says:

“What is the common law? According to Kent: ‘The common law includes those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature.’ 1 Kent, Com. 471. As Blackstone says: ‘Whence it is that in our law the goodness of a custom depends upon its having been used time \*out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this Kingdom. This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole Kingdom, and form the common law, in its stricter and more usual signification.’ 1 Bl. Com. 67. In Black’s Law Dictionary, page 232, it is thus defined: ‘As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.’”

Mr. Frederick Van Dyne, formerly Assistant Solicitor of the Department of State of the United

States, has this to say upon the common law doctrine:

“1. Common-law doctrine.—There is no uniform rule of international law covering the subject of citizenship. Every nation determines for itself who shall, and who shall not, be its citizens. According to the law of some states, citizenship by birth depends upon the place of birth. This is the *jus soli*, or common-law doctrine. According to the law of other states, citizenship depends upon the nationality of the parents. This is the *jus sanguinis*,—sometimes erroneously termed the doctrine of the law of nations, because it obtains in many countries. In some countries both elements exist, the one or the other, however, predominating. By the law of the United States, citizenship depends, generally, on the place of birth; nevertheless the children of citizens, born out of the jurisdiction of the United States, are also citizens. The existence of these two doctrines, side by side, in this country, is the cause of much of the confusion which has arisen in relation to citizenship in the United States. Formerly, the lack of any definition of citizenship in our fundamental law and in our statutes further complicated the matter; and the somewhat ambiguous language employed in supplying this defect rendered it a debatable question whether or not it was intended to declare the common-law doctrine.”

(“Citizenship of the United States, Van Dyne, Page 3.)

It is the Government’s contention that under the common law citizenship could only be acquired by



birth and that it was not until parliamentary or legislative action that citizenship could be acquired by naturalization or by reason of being born abroad to parents who were themselves citizens of a particular country. We find support of this contention in Cooley's Blackstone, as follows:

“When I say, that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. *The common law, indeed, stood absolutely so*, with only a very few exceptions; so that a particular act of parliament became necessary after the restoration, (y) ‘for the naturalization of children of his majesty's English subjects, born in foreign countries during the late troubles.’ And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of the king's ambassadors born abroad were always held to be natural subjects: (z) for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of postliminium: recovery) to be born under the king of England's allegiance, represented by his father the ambassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. III, st. 2, that all children born abroad, provided *both* their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England;



and accordingly it hath been so adjudged in behalf of merchants. (a) But by several more modern statutes (b) these restrictions are still farther taken off; so that all children, born out of the king's ligeance, whose *fathers* (or *grand-fathers* by the father's side) were natural-born subjects, are now deemed to be natural-born subjects themselves to all intents and purposes; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain. Yet the grandchildren of such ancestors shall not be privileged in respect of the alien's duty, except they be protestants, and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue."

("Cooley's Blackstone," Fourth Edition, Vol. I, Page 316, \*373.)

On page 9 of appellants' reply brief counsel quotes the statute 25 Edw. III, and the language of Mr. Justice Gray in the case of *United States vs. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456, wherein the Court said:

"It has been pertinently observed that 'if the Statute of Edward III had been declaratory of the common law, the subsequent legislation on the subject would have been wholly unnecessary.' "

This supports the Government's contention in this case that, according to the common law, children

born abroad of the subjects of Great Britain were not considered subjects of that Kingdom, and it was only after legislation conferring upon them the status of citizenship, that they were considered as such.

It is the Government's contention that the common law rule governed in such matters in the Kingdom and Republic of Hawaii and that in the absence of a particular statute showing that the appellants herein were considered to be citizens or subjects of either the Kingdom or the Republic of Hawaii, that they are not now entitled to admission to the United States as citizens thereof.

Respectfully submitted,

JOHN T. WILLIAMS,

*United States Attorney,*

BEN F. GEIS,

*Assistant United States Attorney,*

*Attorneys for Appellee.*



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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THE UNITED STATES OF AMERICA,  
Plaintiff in Error,

vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS, Hus-  
band and Wife,  
Defendants in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District  
Court of the Western District of Wash-  
ington, Northern Division.

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FILED  
JUL 30 1907  
F. D. MONGKTON,  
CLERK





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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THE UNITED STATES OF AMERICA,  
Plaintiff in Error,  
vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS, Hus-  
band and Wife,  
Defendants in Error.

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Transcript of Record.

---

Upon Writ of Error to the United States District  
Court of the Western District of Wash-  
ington, Northern Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Counsel.**

ROBERT C. SAUNDERS, Esq., United States  
District Attorney, Attorney for Plaintiff in  
Error,

310 Federal Building, Seattle, Washington.

F. C. REAGAN, Esq., Assistant United States Dis-  
trict Attorney, Attorney for Plaintiff in Error,

310 Federal Building, Seattle, Washington.

JAMES P. WETER, Esq., Attorney for Defend-  
ants in Error,

1012 Lowman Building, Seattle, Washing-  
ton.

FRED M. ROBERTS, Esq., Attorney for Defend-  
ants in Error,

1012 Lowman Building, Seattle, Washing-  
ton. [1\*]

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United States District Court, Western District of  
Washington, Northern Division.

No. 5725.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. J. MATTHEWS and MAUDE K. MA-  
TTHEWS, Husband and Wife.

Defendants.

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\*Page-number appearing at foot of page of original certified Transcript  
of Record.



**Complaint.**

Comes now Robert C. Saunders, United States District Attorney for the Western District of Washington, who prosecutes this cause for and in the name of the United States and under the authority and direction of the Attorney General, and for cause of complaint against the defendants alleges:

**I.**

That at all the times hereinafter mentioned the defendants, J. J. Matthews and Maude K. Matthews, were, and they are now, husband and wife, and that they reside at Seattle, in King County, Washington, and within the jurisdiction of this court.

**II.**

That at all the times hereinafter mentioned the said J. J. Matthews was engaged in business under the name and style of "J. J. Matthews & Co.," and that the business of the said defendant consisted, among other things, of dealing in timber products; that the said business so conducted by the said defendant J. J. Matthews constituted a community business, enterprise, occupation, and undertaking of the said J. J. Matthews and his said wife, Maude K. Matthews, and that all the profits inured to the said marital community of the said [2] defendant, and that all the obligations incurred in and arising from said business were, and are, community obligations of the said defendants.

III.

That heretofore, to wit, on or about the 27th day of November, 1918, at Seattle aforesaid, the plaintiff, by and through its agent or governmental department, the Emergency Fleet Corporation, paid to the said defendant J. J. Matthews, doing business, as aforesaid, under the name and style of J. J. Matthews & Co., the sum of Twenty-five Hundred Eight Dollars and Seventy-eight Cents (\$2,508.78), which said payment was made through error and mistake, and was without valuable or any consideration therefor.

IV.

That the plaintiff has often demanded of the said defendants the return and reimbursement to the plaintiff of the said sum of money so erroneously paid as aforesaid, to wit, the sum of Twenty-five Hundred Eight Dollars and Seventy-eight Cents (\$2,508.78), but that the said defendants have wholly failed and refused to pay the said sum of money or any part thereof.

WHEREFORE, plaintiff demands judgment against the said defendants and each of them, and against the marital community composed of said defendants, for the sum of Twenty-five Hundred Eight Dollars and Seventy-eight Cents (\$2,508.78), together with interest thereon at the rate of six per centum (6%) per annum from November 27, 1918, and together with its costs and disbursements.

ROBT. C. SAUNDERS,

United States Attorney,

R. E. CAPERS,

Assistant United States Attorney. [3]

United States of America,  
Western District of Washington,  
Northern Division,—ss.

R. E. Capers, being first duly sworn, on his oath deposes and says: That he is Assistant United States Attorney for the Western District of Washington, and as such is the attorney in charge of the prosecution in the foregoing motion; that he has read the above complaint, knows the contents thereof, and that the statements therein contained are true, as he verily believes.

R. E. CAPERS.

Subscribed and sworn to before me this 9th day of December, A. D. 1920.

[Seal] F. M. HARSHBERGER,  
Clerk U. S. Dist. Court, Western Dist. of Wash-  
ington.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 9, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [4]

United States District Court, Western District of  
Washington, Northern Division.

No. 5725.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS, Husband and Wife.

Defendants.

**Demurrer.**

Comes now the defendant in the above-entitled action and demurs to the complaint of plaintiff upon the following grounds:

First: That there is a defect in parties plaintiff.

Second: That said action was not commenced within the time limited by law.

Third: That same does not state facts sufficient to constitute a cause of action.

WETER & ROBERTS and

WM. G. LONG,

Attorneys for Defendants.

Received a copy of the within Demurrer this  
10th day of February, 1920.

ROBT. C. SAUNDERS,

Attorney for Plaintiff.

By E. D. DUTTON.

[Endorsed]: Filed in the United States District  
Court, Western District of Washington, Northern

Division. Feb. 10, 1921. F. M. Harshberger,  
Clerk. By S. E. Leitch, Deputy. [5]

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In the District Court of the United States, Western  
District of Washington, Northern Division.

No. 5725.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS, Husband and Wife.  
Defendants.

**Memorandum Decision.**

Filed March 14, 1921.

Hon. ROBT. C. SAUNDERS, U. S. Attorney,  
Hon. R. E. CAPERS, Asst. U. S. Attorney,  
for Plaintiff.

WETER & ROBERTS, WM. G. LONG, for Defendants.

CUSHMAN, District Judge.

The complaint alleges that the defendants, husband and wife, were engaged as a firm in a community business, dealing in timber products; that the plaintiff, the United States, through its agent, the Emergency Fleet Corporation, through error and mistake, paid certain money to such firm.

The Shipping Board Act of September 7, 1916, created a Board of five commissioners, to be ap-



pointed by the President, by and with the consent of the Senate. This Act (by section 8146-f (U. S. Comp. Stat. Ann.), provided that the Board, in its judgment, might form, under the laws of the District of Columbia, one or more corporations for acquiring and operating merchant vessels. The Board was authorized by the Act to subscribe for the [6] stock of such corporations. The Emergency Fleet Corporation was organized by the Board under this Act and the laws of the District of Columbia and it subscribed for the entire stock of the corporation.

The incorporation act of the District of Columbia provides that, when the certificate of incorporation is filed, the persons signing and acknowledging the certificate shall, by the name in the certificate, be capable of suing and being sued in courts of law and equity.

Defendants demur to the complaint upon the grounds:

1. That there is a defect in parties plaintiff.
2. That said action was not commenced within the time limited by law.
3. That same does not state facts sufficient to constitute a cause of action.

From the terms of the Shipping Board Act and the incorporation act of the District of Columbia, I am of the opinion that an intention is shown on the part of Congress that suits by the Emergency Fleet Corporation should be brought in its own name; that the discretion or authority to prosecute suits otherwise does not reside elsewhere. It

is not true that attributes of sovereignty inhering in Government establishments are lost, unless the suits are prosecuted in the name of the sovereign.

Ballaine v. Alaska Northern Ry. Co., 259 Fed. 183.

Demurrer sustained on the first ground. No ruling on the other grounds.

[Indorsed]: Filed in the United States District Court, Western District of Washington. Northern Division. Mar. 14, 1921. F. M. Harsberger, Clerk. By S. E. Leitch, Deputy. [7]

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United States District Court, Western District of  
Washington, Northern Division.

No. 5725.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS,  
Husband and Wife,

Defendants.

**Petition for Reargument.**

Comes now the plaintiff and respectfully petitions this Court for a reargument and a reconsideration of defendant's demurrer, for the reason and upon the ground that the Court in its memorandum decision, filed March 14th, 1921, sustaining defendants' demurrer, based its decision on the Shipping Act of 1916 (Sec. 8146-f, U. S. Comp.

Stat. Ann.), while the Merchant Marine Act 1920, an act of Congress passed June 5, 1920, repealed the Act creating the Emergency Fleet Corporation, and assigned all the contracts, agreements, rights, interests, and remedies of the Emergency Fleet Corporation to the United States Shipping Board, which is a United States Government administrative body.

ROBERT C. SAUNDERS,  
United States Attorney,  
F. C. REAGAN,  
Assistant United States Attorney,  
Attorneys for Plaintiff.

Service with a copy of the within reply acknowledged this 7th day of April, 1921.

WETER & ROBERTS.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 7, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [8]

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United States District Court, Western District of  
Washington, Northern Division.

No. 5725.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

J. J. MATTHEWS, et ux.,  
Defendants,

**Journal Order Denying Petition for Rehearing.**

Now on this 18th day of April, 1921, this cause comes on for rehearing. Petition is denied and exception is allowed.

Journal #9, page 184. [9]

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United States District Court, Western District of  
Washington, Northern Division.

No. 5725.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS,  
Husband and Wife,  
Defendants.

**Judgment.**

BE IT REMEMBERED that this matter came on heretofore and on the 7th day of March, 1921, duly and regularly for hearing upon the demurrer of the defendants to the complaint of the plaintiff, the plaintiff appearing by F. C. Reagan, Assistant United States Attorney, and the defendants by their attorneys, Weter & Roberts, and the matter being duly presented to the court by the attorneys for the respective parties, and the Court having considered said demurrer and finding that there was a defect in parties plaintiff and that said demurrer was well taken and should be sustained, directs that the demurrer so filed by the defendants to the complaint of the plaintiff be sustained.

And the plaintiff subsequent thereto having filed its petition for reargument and said petition having heretofore come on for hearing on the 18th day of April, 1921, duly and regularly for hearing, and the Court having considered said petition denied the same.

And the plaintiff subsequent thereto having failed to amend its complaint or to present any further, other or additional applications for a reconsideration of the order so made by the [10] court sustaining said demurrer, and the plaintiff electing to stand upon its complaint, and refusing to plead further,—

NOW, THEN, upon motion of the defendants for judgment, it is by the Court ORDERED, ADJUDGED, AND DECREED that the plaintiff take nothing by reason of its alleged cause of action herein as against the defendants, and that this action as against the defendants be and it is hereby dismissed, and that the defendants go hence without day and have and recover of and from the plaintiff its cost and disbursements herein to be taxed; to all of which the plaintiff has excepted and an exception is allowed.

Done in open court this 17th day of May, 1921.

EDWARD E. CUSHMAN,

Judge.

O. K.—WETER & ROBERTS,

Attys. for Def.

F. C. REAGAN,

Asst. U. S. Atty.,

Atty. for Pltff.



[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

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United States District Court, Western District of  
Washington, Northern Division.

No. 5725.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS,  
Husband and Wife,

Defendants.

**Petition for Writ of Error.**

Comes now the United States of America, plaintiff in the above-entitled cause, and feeling aggrieved by the final judgment herein entered on May 17, 1921, petitions this Court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and according to the laws of the United States in that behalf made and provided, there to correct certain errors committed to the prejudice of the said plaintiff, which more in detail appear from the assignment of errors filed with this petition, and prays that a writ of error issue out of said Court of Appeals, for the correction of the error so complained of, and that the transcript

of the record and proceedings and papers in this cause, duly authenticated, may be sent to said Court of Appeals.

ROBERT C. SAUNDERS,  
United States Attorney,  
F. C. REAGAN,  
Assistant United States Attorney,  
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [12]

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United States District Court, Western District of  
Washington, Northern Division.

No. 5725.

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS,  
Husband and Wife,  
Defendants,

**Assignment of Errors.**

Comes now the plaintiff, United States of America, by and through Robert C. Saunders, United States District Attorney, and files the following assignment of errors upon which he will rely upon his appeal from the judgment made by this Honor-

able Court on the 17th day of May, 1921, in the above-entitled cause:

I.

That the United States District Court for the Western District of Washington, Northern Division, erred in sustaining the demurrer of the defendants to the complaint of the plaintiff herein.

II.

The said District Court erred in dismissing said action.

ROBERT C. SAUNDERS,  
United States Attorney,  
F. C. REAGAN,  
Assistant United States Attorney,  
Attorneys for the Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

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United States District Court, Western District of  
Washington, Northern Division.

No. 5725.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS,  
Husband and Wife,  
Defendants.

**Order Allowing Writ of Error.**

Comes the plaintiff, United States of America, by its attorneys, and files herein and presents to the Court its petition praying for the allowance of a writ of error on assignment of error intended to be urged, and praying also that a transcript of record and proceedings, upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings be had as may be proper in the premises. Now, on consideration thereof, the Court does hereby allow the Writ of Error prayed for.

Dated this 17th day of May, 1921.

EDWARD E. CUSHMAN,  
United States District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [14]

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United States District Court, Western District of  
Washington, Northern Division.

No. 5725.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS,  
Husband and Wife,

Defendants. -

**Admission of Service of Petition for Writ of  
Error, etc.**

Due, timely and regular service, together with the receipt of copies thereof, of the plaintiff's petition for writ of error, of order allowing writ of error, and praecipe for transcript of record is hereby admitted this 17th day of May, 1921.

WETER & ROBERTS,  
Attorneys for the Defendants.

Received a copy of the within this 17th day of May, 1921.

WETER & ROBERTS,  
Attorneys for the Defendants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [15]

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United States District Court, Western District of  
Washington, Northern Division.

No. 5725.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS,  
Husband and Wife,  
Defendants,



**Praeipice for Transcript of Record.**

To the Clerk of the Above-entitled Court:

You will please prepare a typewritten transcript of record in the above-entitled cause on writ of error, and file the same in the United States Circuit Court of Appeals for the Ninth Circuit, said record to comprise the following papers:

1. Complaint.
2. Demurrer.
3. Memorandum decision.
4. Petition for reargument.
5. Clerk's entry denying petition for reargument.
6. Judgment.
7. Petition for writ of error.
8. Assignment of errors.
9. Order allowing writ of error.
10. Admission of service.
11. This praeipice.

ROBERT C. SAUNDERS,  
United States Attorney,  
F. C. REAGAN,  
Assistant United States Attorney,  
Attorneys for Plaintiff. [16]

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing, as provided under rule 105 of this Court.

ROBERT C. SAUNDERS,  
United States Attorney,  
F. C. REAGAN,  
Assistant United States Attorney,  
Attorneys for Plaintiff.

We hereby acknowledge service of copy of the foregoing praecipe, waive the right to request the insertion of any other matters than those incorporated in the foregoing praecipe, and stipulate that the proceedings, papers, orders and documents included in said praecipe constitute a full and sufficient record upon writ of error.

WETER & ROBERTS,  
Attorneys for Defendants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [17]

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United States District Court, Western District of  
Washington, Northern Division.

No. 5725.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS,  
Husband and Wife,

Defendants.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Wash-

ington, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 17, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses and costs incurred in my office on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making  
 record, certificate or return, 34 folios  
 at 15¢..... \$5.10

[18]

Certificate of Clerk to transcript of record,  
 4 folios at 15¢..... .60  
 Seal to said certificate..... .20

I hereby certify that the above cost for preparing and certifying record, amounting to \$5.90, will be included in my quarterly account to the Government of fees and emoluments for the quarter ending June 30th, 1921.

I further certify that I hereto attach and herewith transmit the original citation, and original

writ of error issued in this cause, together with acceptance of service thereof.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 31st day of May, A. D. 1921.

[Seal] F. M. HARSHBERGER,  
Clerk of United States District Court, Western  
District of Washington. [19]

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[Endorsed]: No. 3697. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. J. J. Matthews and Maude K. Matthews, Husband and Wife, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed June 3, 1921.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. —.

UNITED STATES OF AMERICA,  
Plaintiff in Error,  
vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS,  
Husband and Wife,  
Defendants in Error.

**Writ of Error (Original).**

The United States of America,—ss.

The President of the United States of America, to  
the Honorable Judges of the District Court of  
the United States for the Western District of  
Washington, Northern Division, GREETING:

Because in the record and proceedings, as also  
in the rendition of the judgment of a plea which is  
in said District Court, before the Honorable Ed-  
ward E. Cushman, between United States of  
America, the plaintiff in error, and J. J. Matthews  
and Maude K. Matthews, husband and wife, the  
defendants in error, a manifest error hath happened  
to the prejudice and great damage of United States  
of America, plaintiff in error, as by his complaint  
and petition herein appears, and we being willing  
that error, if any hath been, should be duly cor-  
rected, and full and speedy justice done to the  
party aforesaid in this behalf, DO COMMAND  
YOU, if judgment be therein given, that under your  
seal, distinctly and openly, you send the record and



proceedings with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, together with this writ, so that you have the same at said City of San Francisco within thirty days from the date hereof, in said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being then and there inspected, said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States of America should be done in the premises.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 18th day of May, 1921, and the year of the Independence of the United States, one hundred and forty-fourth.

[Seal] F. M. HARSHBERGER,  
Clerk of the District Court of the United States for  
the Western District of Washington, Northern  
Division.

Acceptance of service of within writ of error  
acknowledged this —— day of May, 1921.

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Attorneys for Defendants in Error.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 18, 1921. F. M. Harshberger, Clerk. By F. L. Crosby, Jr., Deputy.

No. 3697. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plaintiff in Error, vs. J. J. Matthews and Maude K. Matthews, Husband and Wife, Defendants in Error. Writ of Error. Filed Jun. 3, 1921. F. D. Monckton, Clerk.

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In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. —.

UNITED STATES OF AMERICA,  
Plaintiff in Error,  
vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS,  
Husband and Wife,  
Defendants in Error.

**Citation on Writ of Error (Original).**

The United States of America,—ss.

The President of the United States of America, to  
Weters & Roberts, Attorneys for Defendants  
in Error, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the United States of America is plaintiff in error, and J. J. Matthews

and Maude K. Matthews, husband and wife, are defendants in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS, the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 18th day of May, 1921.

EDWARD E. CUSHMAN,  
United States District Judge.

[Seal]            Attest: F. M. HARSHBERGER,  
Clerk of the District Court of the United States,  
for the Western District of Washington,  
Northern Division.

Acceptance of service of within Citation on Writ of Error acknowledged this ——— day of May, 1921.

---

Attorneys for Defendants in Error.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 18, 1921. F. M. Harshberger, Clerk. By F. L. Crosby, Jr., Deputy.

No. 3697. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plaintiff in Error, vs. J. J. Matthews and Maude K. Matthews, Husband and Wife, Defendants in Error. Citation on Writ of Error. Filed Jun. 3, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. —.

UNITED STATES OF AMERICA,  
Plaintiff in Error,  
vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS,  
Husband and Wife,  
Defendants in Error.

**Acceptance of Service.**

Due and timely service of Writ of Error and Citation on Writ of Error in the above-entitled cause is hereby acknowledged this 23d day of May, 1921.

WETER & ROBERTS,  
Attorneys for Defendants in Error.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 23, 1921. F. M. Harshberger, Clerk. By F. L. Crosby, Jr., Deputy.

No. 3697. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun. 3, 1921. F. D. Monckton, Clerk.





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# In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF  
AMERICA,

*Plaintiff in Error,*

vs.

J. J. MATTHEWS and MAUDE  
K. MATTHEWS, Husband and  
Wife,

*Defendants in Error.*

No. 3697

*Upon Writ of Error to the United States District  
Court of the Western District of Washington,  
Northern Division.*

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## BRIEF OF PLAINTIFF IN ERROR.

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ROBERT C. SAUNDERS,  
United States Attorney,

F. C. REAGAN,  
Assistant United States Attorney.

*Attorneys for Plaintiff in Error.*

Office and Post Office Address:  
310 Federal Bldg., Seattle, Wash.



# In the United States Circuit Court of Appeals

For the Ninth Circuit

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THE UNITED STATES OF  
AMERICA,

*Plaintiff in Error,*

vs.

J. J. MATTHEWS and MAUDE  
K. MATTHEWS, Husband and  
Wife,

*Defendants in Error.*

---

No. 3697

## BRIEF OF PLAINTIFF IN ERROR

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### STATEMENT

Plaintiff in error in its complaint alleges that the defendants in error are husband and wife, engaged as a firm in a community business of dealing in timber products, and that on November 27, 1918, acting by and through its agent or governmental department, the Emergency Fleet Corporation, the plaintiff in error paid to the said defendants in error the sum of \$2508.78 which payment was made through error and mistake and was without valuable or any other consideration. Defendants in

error demurred to said complaint, upon the following grounds:

1. That there is a defect in parties plaintiff.
2. That said action was not commenced within the time limited by law.
3. That the same does not state facts sufficient to constitute a cause of action.

Thereafter the court filed its memorandum opinion, which is as follows:

“The complaint alleges that the defendants, husband and wife, were engaged as a firm in a community business, dealing in timber products; that the plaintiff, the United States, through its agent, the Emergency Fleet Corporation, through error and mistake, paid certain money to such firm.

“The Shipping Board Act of September 7, 1916, created a Board of five commissioners, to be appointed by the President, by and with the consent of the Senate. This Act (by section 8146-f [U. S. Comp. Stat. Ann.]), provided that the Board, in its judgment, might form, under the laws of the District of Columbia, one or more corporations for acquiring and operating merchant vessels. The Board was authorized by the Act to subscribe for the (6) stock of such corporations. The Emergency Fleet Corporation was organized by the Board under this Act and the laws of the District

of Columbia and it subscribed for the entire stock of the corporation.

"The incorporation act of the District of Columbia provides that, when the certificate of incorporation is filed, the persons signing and acknowledging the certificate shall, by the name in the certificate, be capable of suing and being sued in courts of law and equity.

"Defendants demur to the complaint upon the grounds:

"1. That there is a defect in parties plaintiff.

"2. That said action was not commenced within the time limited by law.

"3. That same does not state facts sufficient to constitute a cause of action.

"From the terms of the Shipping Board Act and the incorporation act of the District of Columbia, I am of the opinion that an intention is shown on the part of Congress that suits by the Emergency Fleet Corporation should be brought in its own name; that the discretion or authority to prosecute suits otherwise does not reside elsewhere. It is not true that attributes of sovereignty inhering in Government establishments are lost, unless the suits are prosecuted in the name of the sovereign.

"*Ballaine v. Alaska Northern Ry. Co.*, 259 Fed. 183.

"Demurrer sustained on the first ground. No ruling on the other grounds." (Tr. pp. 6-8.)



Plaintiff in error filed its petition for re-hearing as follows:

“Comes now the plaintiff and respectfully petitions this court for a reargument and a reconsideration of defendant’s demurrer, for the reason and upon the ground that the court in its memorandum decision, filed March 14, 1921, sustaining defendants’ demurrer, based its decision on the Shipping Act of 1916 (Sec. 8146-f, U. S. Comp. Stat. Ann.), while the Merchant Marine Act 1920, an act of Congress passed June 5, 1920, repealed the Act creating the Emergency Fleet Corporation, and assigned all the contracts, agreements, rights, interests, and remedies of the Emergency Fleet Corporation to the United States Shipping Board, which is a United States Government administrative body.” (Tr. pp. 8-9.)

This petition came on for hearing on April 18, 1921, and was denied.

### JUDGMENT.

“Be it remembered that this matter came on heretofore and on the 7th day of March, 1921, duly and regularly for hearing upon the demurrer of the defendants to the complaint of the plaintiff, the plaintiff appearing by F. C. Reagan, Assistant United States Attorney, and the defendants by their attorneys, Weter & Roberts, and the matter being duly presented to the court by the attorneys for the respective

parties, and the court having considered said demurrer and finding that there was a defect in parties plaintiff and that said demurrer was well taken and should be sustained, directs that the demurrer so filed by the defendants to the complaint of the plaintiff be sustained.

“And the plaintiff subsequent thereto having filed its petition for reargument and said petition having heretofore come on for hearing on the 18th day of April, 1921, duly and regularly for hearing, and the court having considered said petition denied the same.

“And the plaintiff subsequent thereto having failed to amend its complaint or to present any further, other or additional applications for a reconsideration of the order so made by the court sustaining said demurrer, and the plaintiff electing to stand upon its complaint, and refusing to plead further,—

“Now, then, upon motion of the defendants for judgment, it is by the court ORDERED, ADJUDGED and DECREED that the plaintiff take nothing by reason of its alleged cause of action herein as against the defendants, and that this action as against the defendants be and it is hereby dismissed, and that the defendants go hence without day and have and recover of and from the plaintiff their costs and disbursements herein to be taxed; to all of which the plaintiff has excepted and an exception is allowed.” (Tr. pp. 10-11.)

Plaintiff in error prosecutes this appeal from this judgment.

### “ASSIGNMENT OF ERRORS.

“Comes now the plaintiff, United States of America, by and through Robert C. Saunders, United States District Attorney, and files the following assignment of errors upon which he will rely upon his appeal from the judgment made by this Honorable Court on the 17th day of May, 1921, in the above entitled cause:

#### “I.

“That the United States District Court for the Western District of Washington, Northern Division, erred in sustaining the demurrer of the defendants to the complaint of the plaintiff herein.

#### “II.

“That said District Court erred in dismissing said action.” (Tr. pp. 13-14.)

### ARGUMENT.

A reading of the opinion of the trial court discloses the fact that the demurrer to the complaint was sustained on the ground that there was a defect in the parties plaintiff; the court saying:

“From the terms of the Shipping Board Act and the incorporation act of the District of Columbia, I am of the opinion that an intention is shown on the part of Congress that suits by the Emergency Fleet Corporation should be brought in its own name; that the discretion or authority to prosecute suits otherwise does not reside elsewhere.”

The contention of the plaintiff in error is that in this the court was in error, on the following grounds:

(1) The United States was the real party in interest.

(2) The United States Emergency Fleet Corporation was a governmental arm or agency of the United States.

(3) The Act of Congress of June 5, 1920, known as the Merchant Marine Act or Jones Act transfers to the United States Shipping Board, an admitted governmental agency, all contracts, rights, interest and remedies accruing or to accrue in pursuance of any provision of the Shipping Act of 1916 or the Merchant Marine Act of 1920, and specifically directs that said Board settle, adjust and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred upon the President by the Shipping Act of 1916.

The Shipping Act of 1916 (39 U. S. Stat. at Large 728, Comp. Stat. Sec. 8146-A, *et seq.*) is declared by Congress to be "An Act to establish a

"United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a mer-



chant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes."

The United States Emergency Fleet Corporation, under Section 8146, U. S. Comp. Stat., was formed under the laws of the District of Columbia. The United States Shipping Board was authorized by the act to and did subscribe for the entire stock of the Emergency Fleet Corporation.

The Merchant Marine Act of 1920 (Act of Congress of June 5, 1920), was an act which provided:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and,



in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be obtained."

Under Section 2 of this Act we find certain provisions of the Shipping Act of 1916 repealed.

"(b) The repeal of such Acts or parts of Acts is subject to the following limitations:

"(1) All contracts or agreements lawfully entered into before the passage of this Act under any such Act or part of Act shall be assumed and carried out by the United States Shipping Board, hereinafter called 'the board.'

"(2) All rights, interests, or remedies accruing or to accrue as a result of any such contract or agreement or of any action taken in pursuance of any such Act or parts of Acts shall be in all respects as valid, and may be exercised and enforced in like manner, subject to the provisions of subdivision (c) of this section, as if this Act had not been passed.

\* \* \* \* \*

"(c) As soon as practicable after the passage of this Act the board shall adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such

Act or parts of Acts; and for this purpose the board, instead of the President, shall have and exercise any of such powers and duties relating to the determination and payment of just compensation: *Provided*, That any person dissatisfied with any decision of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed."

These provisions, quoted from the Acts of 1916 and 1920, clearly show that the United States is the real party in interest in this case. It goes even further than that and shows that the Emergency Fleet Corporation was exercising governmental functions in that it was developing and creating a naval reserve and a naval auxiliary, and that, in the words of Congress, it was necessary for the national defense to serve as a naval and military auxiliary in time of war or national emergency.

Section 179 of Remington & Ballinger's Code of Washington, provides:

"Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law."

Section 914, of the United States Revised Statutes, Section 1537 of the Compiled Statutes, provides:

“The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the (circuit and) district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such (circuit or) district courts are held, any rule of the court to the contrary notwithstanding.”

We submit that the United States, under the above Acts of Congress and the Washington Statutes was the real party in interest and was the proper party plaintiff in this action, and that there was no defect of parties plaintiff, and that under the Acts of 1916 and 1920 the Emergency Fleet Corporation was a governmental agency acting for and on behalf of the United States.

It was said by Chief Justice Marshall, in the *Dartmouth College* case (4 Wheat. 518; 4 Legal Ed. 629), “to determine the character of a corporation the beneficial purposes to which the property of the corporation is to be used may be considered.”

It is a matter of common knowledge that the United States Emergency Fleet Corporation was formed for the purpose of operating naval and military transports during the emergency with the

war with Germany; in fact, it might be said that the sole purpose of its organization was to assist in dispatching and transporting to Europe supplies and men to carry on the war. It cannot be denied that this was a governmental function.

The Supreme Court in the *Lake Monroe* (250 U. S. 246; 63 L. Ed. 962), says:

“But at the time of the emergency provision of June 15, 1917, the Shipping Board had been established as a public commission, with broad administrative powers, and subject to definite restrictions, and the Fleet Corporation had been created as its agency, financed with public funds. The emergency shipping legislation evidently was enacted in the expectation that the President would employ the Shipping Board and the Fleet Corporation as its agencies to exercise the new powers, for the Fleet Corporation was mentioned in the act, and it was known to be but an arm of the Board.”

In the case of *Ballaine v. Alaska Northern Railway Company*, 259 Fed. 183, the evidence showed that the United States owned not only the property of the Alaska Northern Railway Company, but all its stocks and bonds, and this court found that while the United States was the owner, the corporation was its agent for governmental and public purposes,



and held that without the consent of the government the corporation could not be sued; the court saying:

“The Act of March 12, 1914, c. 37, heretofore cited, which authorizes the President to locate, construct, and operate railroads in Alaska, expressly provides that the Alaska railroad is for the settlement of public lands and for transportation of coal for the army and navy, for the transportation of troops, arms, munitions of war, the mails, and for ‘other governmental and public uses,’ and to transport passengers and property. The act (section 4) also confers authority upon the President, through such agents as he may appoint or employ, to do all necessary acts, in addition to those specially authorized, to enable him to accomplish the purposes of the act. By section 1 the President is authorized to purchase or acquire other railroads to carry out the purposes of the act, and to employ officers and agents in order to accomplish the purpose of the legislation. Taking all these provisions together, they plainly show that the United States, in acquiring the stocks and bonds and property of the Alaska Northern Railway Company, acted in its sovereign capacity, and in exercising entire control, possession, ownership, and management, has merely employed the corporate organization as an agency through which to execute the purposes of the statute.”

This court in that case cited as authority, *California v. Pacific Railway Company*, 127 U. S. 1,



32 L. Ed. 150; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 38 L. Ed. 808, and *Indiana v. United States*, 148 U. S. 148, 37 L. Ed. 401, all of which hold that Congress can create corporations as the appropriate means of executing the powers of government.

In *Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corporation*, 268 Fed. 624, Judge Neterer, in a very learned and exhaustive opinion, held that the United States was the real party in interest:

“The intent of the Congress in the agency employed and the directions given, the provisions of the act, and legislation with relation thereto, appear to be conclusive that the United States acted in its sovereign capacity, and in exercising entire control, possession, ownership, and management it has merely employed the corporate organization of its own creation so far as applicable as an instrumentality or ‘arm,’ with which to execute the purposes of this Statute, and in so doing it was not divested of its sovereignty.”

Under the above citations it would seem that there can be no question but the United States was the real party in interest and was the proper party plaintiff, and that the Emergency Fleet Corporation

was but an instrumentality or arm through which the United States acted in its sovereign capacity, and with which the United States carried out the intention of Congress.

Section 2, subdivision (b) of the Act of Congress of June 5, 1920, known as the Merchant Marine Act, repealed certain emergency shipping legislation, and in the sections quoted above transferred to the United States Shipping Board all contracts, agreements, rights, interests and remedies accruing or to accrue by reason of any actions taken in pursuance of the Act of 1916. It went further, and provides that said board shall adjust, settle and liquidate all matters pertaining to any action arising out of or pursuant to said act.

There can be no argument that the United States Shipping Board is a governmental agency functioning for and on behalf of the United States. This action was brought in December, 1920, nearly six months after the Merchant Marine Act was passed, and it would seem that it would need no extended argument to the proposition that the United States was the real party in interest and was the proper party plaintiff.

We submit that the judgment of the trial court

should be reversed, with directions to overrule the demurrer.

Respectfully submitted,

ROBT. C. SAUNDERS,  
United States Attorney.

FRANCIS C. REAGAN,  
Assistant United States Attorney.  
*Attorneys for Plaintiff in Error.*

**United States**  
**Circuit Court of Appeals**  
**For The Ninth Circuit**

---

THE UNITED STATES OF AMERICA,  
*Plaintiff in Error,*

*vs.*

J. J. MATTHEWS and MAUDE K. MATTHEWS,  
Husband and Wife,

*Defendants in Error.*

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WRIT OF ERROR TO THE DISTRICT  
COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN  
DIVISION.

HON. EDWARD E. CUSHMAN, *Judge.*

---

**BRIEF OF DEFENDANTS IN ERROR**

---

JAMES P. WETER,  
F. M. ROBERTS,  
WM. G. LONG,

*Attorneys for Defendants in Error.*

1012 Lowman Building, Seattle, Washington.

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Filed

SEP 13 1911





**United States**  
**Circuit Court of Appeals**  
**For The Ninth Circuit**

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THE UNITED STATES OF AMERICA,  
*Plaintiff in Error,*

*vs.*

J. J. MATTHEWS and MAUDE K. MATTHEWS,  
Husband and Wife,  
*Defendants in Error.*

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WRIT OF ERROR TO THE DISTRICT  
COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF  
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HON. EDWARD E. CUSHMAN, *Judge.*

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**BRIEF OF DEFENDANTS IN ERROR**

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1012 Lowman Building, Seattle, Washington.



**United States**  
**Circuit Court of Appeals**  
**For The Ninth Circuit**

---

THE UNITED STATES OF AMERICA,  
*Plaintiff in Error,*

*vs.*

J. J. MATTHEWS and MAUDE K. MATTHEWS,  
Husband and Wife,  
*Defendants in Error.*

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WRIT OF ERROR TO THE DISTRICT  
COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN  
DIVISION.

HON. EDWARD E. CUSHMAN, *Judge.*

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**BRIEF OF DEFENDANTS IN ERROR**

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**STATEMENT.**

Plaintiff in error commenced an action against defendants in error alleging that on or about the 27th day of November, 1918, the United States Shipping Board Emergency Fleet Corporation paid defendants in error by mistake the sum of \$2508.78.

Defendants in error demurred to the complaint in said action on the grounds:

1. That there is a defect in parties plaintiff.
2. That said action was not commenced within the time limited by law.
3. That the same does not state facts sufficient to constitute a cause of action.

Only the first ground was considered or passed upon and, therefore, the only matter at issue on this appeal is the correctness of the ruling upon that ground. The Court sustained the demurrer in the following opinion:

“From the terms of the Shipping Board Act and the incorporation act of the District of Columbia, I am of the opinion that an intention is shown on the part of Congress that suits by the Emergency Fleet Corporation should be brought in its own name; that the discretion or authority to prosecute suits otherwise does not reside elsewhere.”

Petition for rehearing was denied and dismissal of defendants in error was granted. The contention of the defendants in error was and is *that the United States Shipping Board Emergency Fleet Corporation is a distinct and separate entity apart from the government of the United States; that suits by said corporation should be brought in its own name, and that discretion or authority to prosecute suits otherwise does not reside elsewhere.*

The contentions of the plaintiff in error are:

1. That the United States was the real party in interest.

2. That the United States Shipping Board Emergency Fleet Corporation was a governmental arm, or agency of the United States.

3. The Act of Congress of June 5, 1920, transfers to the United States Shipping Board, an admitted governmental agency, all contracts, rights, interest and remedies accruing, or to accrue, in pursuance of any provision of the Shipping Act of 1916 or the Merchant Marine Act of 1920, and specifically directs that said Board settle, adjust and liquidate all matters arising out of or incident to the exercise by, or through, the President of any of the powers or duties conferred upon the President by the Shipping Act of 1916.

The first two contentions of plaintiff in error will be treated together in this brief for the reason that they mean practically one and the same thing. If the second contention be sound, the first would be sound as a matter of course, and if the second be erroneous, then likewise the first would be erroneous also.

The third contention of plaintiff in error will be treated separately.



## ARGUMENT.

## I.

The United States Shipping Board Emergency Fleet Corporation is not such an agent, or governmental department, as to make the United States the real party in interest in suits such as this arising out of business dealings had between the Emergency Fleet Corporation and defendants in error.

The erroneous impression has arisen that this corporation was in fact a governmental department, or arm, because of the fact that the corporation functioned for the first time during the recent war, and because it had delegated to it considerable powers originally granted to the President by Congress; but if we go back to the very inception of the law authorizing this corporation we readily can ascertain that Congress never intended that it be a governmental department or arm.

Bear in mind that the act authorizing the Emergency Fleet Corporation, the Shipping Act of September 7, 1916, was submitted to Congress for discussion May 16, 1916, almost a year before the declaration of war. This act was but the culmination of a series of attempts made for many years past to extend aid in re-establishing a prosperous United States Merchant Marine. Even a cursory reading of the discussion centering around that bill reveals that the two main purposes thereof were:

1. To extend our commerce.
2. To provide naval auxiliaries in time of war.

It was largely a commercial venture,—a business

proposition. War at that time was not seriously contemplated.

It is interesting to note that from the speeches in the House of Representatives made by the proponents of the Bill before it became a law, nothing seemed farther from their minds than that they were creating in the Emergency Fleet Corporation a governmental department such as plaintiff in error contends was created. They took particular pains to assure those who opposed government ownership, that government ownership was not intended.

“The government ownership feature of this Bill is limited. The possibility of government operation under the pending measure bears the same relation to the balance of the Bill that a single grain of cockle would bear to a full measure of wheat.”

Representative Sanders of Virginia.

Congressional Record p. 8103, May 16, 1916.

“Granting for the sake of argument that government ownership of vessels is objectionable, yet if there is any feature in this Bill, any feature of government ownership, it contains in itself the means for the automatic elimination of all government ownership.”

Representative Burke of Wisconsin.

Congressional Record p. 8091, May 16, 1916.

“Its sole aim and enterprise is to provide the country with shipping facilities absolutely nec-

essary to carry on its commerce with other nations of the world.”

Representative Lazaro of Louisiana.

Congressional Record p. 8103, May 16, 1916.

“This is not a political question,—this is a great business proposition which any man who has any products to ship to foreign countries is interested in.”

Representative Miller of Pennsylvania.

Congressional Record p. 8071, May 16, 1916.

“Another provision that they (the minority) did not approve, was that in reference to the government operation of ships. \* \* \* If you look at Section 11 of the Bill, you will see that it provides that after five years the operation of ships under the corporation in which the government may own a majority of the stock, shall cease. That concession was made to those who opposed permanent government operation of ships. We further provided that these foreign-built ships, and ships operated by a corporation in which the government is the owner of stock, may not be used in Coastwise trade. \* \* \* As we wished to demonstrate that we have no intention to discourage private capital from investing in shipping for fear of competition by the government controlled lines, we wrote that provision in the bill.”

Representatives Alexander.

Congressional Record p. 8079, May 16, 1916.

Not only was the bill advocated because it was

a business proposition, but it was even opposed for the same reason.

“I shall vote against this Bill because the sole argument in its favor is that it is necessary to create a great Merchant Fleet \* \* \* to be run as a government trading venture.”

Representative Siegel of New York.

Congressional Record Appendix 999, May 16, 1916.

These extracts, together with the extended debate of which they are a part, clearly indicate that Congress in passing the law providing for the Emergency Fleet Corporation did not have in mind the creation of a governmental department for the exercise of administrative functions, but did have in mind the creation of an independent corporation aided by the government to assist the commerce of the United States in establishing itself against foreign competition—purely a commercial venture.

The law itself provided (Sec. 11 Shipping Act 1916—8146-F U. S. Compiled Statutes annotated) that the United States Shipping Board might organize a corporation under the laws of the District of Columbia in which the government should hold at least 51% of the stock and private parties might hold 49%, and that this corporation might build, lease and charter ships in foreign commerce. The corporation laws of the District of Columbia, under which the corporation was to be created, provide:

“\* \* \* When the certificate shall have been filed \* \* \* they shall be a body poli-



tic \* \* \* capable of suing and being sued in any Court of law or equity in the District."

Code, District of Columbia, Sec. 607, p. 159.

As further evidence that Congress never intended the Emergency Fleet Corporation to be a governmental department, in the Uurgent Deficiencies Bill for the year ending June 30, 1918, treating of the question of civil service employes, Congress inserted this provision: "That the United States Shipping Board Emergency Fleet Corporation shall be considered a government establishment for the purposes of this section." Sec. 7, chap. 79, Comp. Stat. Ann. Supp. 1919, Sec. 251-B.

Had Congress considered the Emergency Fleet corporation a governmental department, such legislation would have been entirely unnecessary. By thus centering it out, and specifying that for this particular purpose it be considered a government establishment, Congress certainly made it plain that for all other purposes the corporation should not be so considered.

Thus we have the members of Congress continually referring to this law as a business proposition, the corporation itself organized as any other commercial body, capable of suing and being sued, and 49% of its stock capable of being owned by private parties. If Congress really intended this corporation to be a governmental department, or a mere government arm—immune from suit and incapable of suing, it could have done so. But by having clothed it with powers of suing and being



sued, and having provided for the issuance of stock to private parties, as in other private corporations, it impliedly consented that it and its stockholders be regarded as any other corporation and its stockholders. It follows, therefore, that the fact that the United States is a stockholder in the corporation does not make the United States the real party in interest in this case, even though it hold a majority of the stock. The fundamental nature of the corporation remains unchanged.

*Bank of United States vs. Planters Bank of Georgia*, 6 L. Addn. 244.

"It is, we think, a sound principle that, when a government becomes a partner in any trading company, it divests itself, so far as concerns the transaction of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union, who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the

privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act."

Not only does Congressional intent, as expressed in the events leading up to the passage, and expressed in the bill itself, oppose the theory that the Emergency Fleet Corporation is a governmental department, but by far the greater weight of judicial opinion is opposed to such interpretation. In the case of

*Commonwealth Finance Corporation vs.  
Landis (Emergency Fleet Corporation,  
Garnishee)*, 261 Federal 440,

the Emergency Fleet Corporation sought immunity from garnishment on the grounds that it was in fact the United States. Judge Dickinson in denying such immunity, stated at page 443:

"There is this very practical and common-sense view of the broad question here involved and of the general situation presented. Private persons and individuals must deal with this corporation as contractors or otherwise in the accomplishment of the work with which the corporation has to do. Supplies or materials must be furnished to the corporation and to those who have contracted with it. Obligations of some kind to make payment must be incurred.

Congress has found it to be best to so provide that the United States shall not directly incur these obligations. If the obligations incurred were the obligations of the United States, it has so far laid aside the robes of sovereignty as to permit the question of the existence of such obligation to be determined by the Court of Claims and within limits by the District Courts. If this remedy was pursued by any one having a claim, no matter how just that claim might be, the United States might very well interpose the defense that it had not incurred any obligation and the foregoing remedy would be denied the claimant. If the corporation was not amenable to process, then the intolerable situation would be presented that the corporation was free to admit or repudiate its obligations at its free will and pleasure.

*“We are certainly justified in assuming that Congress, by its legislation on the subject, intended that the obligations which necessarily must be incurred will be met either by the United States or this corporation, and that it was further intended that the existence and extent of such obligations should be determined either as against the United States or as against the corporation, and as Congress has not seen fit to have the United States directly assume the obligation, and has not provided any way in which any questions which may*

*arise may be determined in favor or against the United States, the further inference is justified that Congress intended that whatever obligations were incurred were incurred by this corporation, and has further intended that such questions as arise may be determined in favor of or against the corporation."*

We might add here, although the matter is not directly in issue in this appeal, that the suggestion in the foregoing opinion of the difficulty if not utter impossibility of a claimant against the Emergency Fleet Corporation ever litigating his claim against the United States, should receive the earnest consideration of this Court.

If the Emergency Fleet Corporation had sued in its own name, the defendants in error could have counter-claimed against it. But, as stated in the *Finance* case, *supra*, to compel defendants in error to litigate their counter-claims against the Emergency Fleet Corporation in an action with the United States as plaintiff would mean a virtual denial of any redress whatsoever. Such injustice should not be countenanced by this Court.

In

*Gould Coupler Co. vs. United States Shipping Board Emergency Fleet Corporation,*  
261 Fed. 716,

the Emergency Fleet Corporation sought to have process set aside on the grounds of sovereign immunity from process. We quote from Judge Hand's opinion as follows, at page 717:



“Now, in these cases it appears to me too clear for dispute that the Fleet Corporation is in general capable of being sued. Section 11 of the Shipping Act (Comp. St. 8146f) provides that the corporation shall be chartered under the laws of the District of Columbia, and no one disputes that this means under its general corporations laws. The corporation was so formed under Code of Law D. C. c. 18, subchapter 4, which authorized actions by and against any corporation so organized. The Fleet Corporation was therefore meant to be a legal person without immunity quite as much as any other corporation. In view of these provisions it is unnecessary to consider any of the cases touching the general liability to process of corporations in which the United States may be a stockholder or which it may organize for governmental purposes.”

and at page 718:

“\* \* \* It must follow that in choosing the Fleet Corporation he chose it with all its limitations upon its head. In other words, Congress contemplated that possibility and expected that in so delegating his powers he must subject their exercise to the scrutiny of the customary tribunals, precisely as the Fleet Corporation’s other activities were subject.”

A similar holding was made by Judge Foster in  
*American Cotton Oil Co. vs. United States*



*Shipping Board Emergency Fleet Corporation*, 270 Fed. 296.

The Supreme Court of New York in the case of *Ingersoll-Rand vs. United States Shipping Board Emergency Fleet Corporation*, 187 N. Y. S. 695.

refused to accept the theory that the Emergency Fleet Corporation is a governmental department or arm. We quote from the opinion at page 699:

“The business in which this defendant corporation was to be engaged was such as had theretofore been conducted by private persons and corporations. The building, purchasing, leasing and operating of ships from time out of mind had been conducted by private enterprise. When the government decided to invest capital in such business it authorized the incorporation of a business corporation and became a stockholder therein. Such corporation, and not the government, became liable for its debts and satisfaction for such debts is to be obtained out of its property and not as a claim against the United States.”

In the case of

*Lord & Burnham Co. vs. United States Shipping Board Emergency Fleet Corporation*, 265 Fed. 955.

the defendant claimed in defense of the suit that it was merely a governmental instrumentality, and that the action was in effect against the United States and not authorized by law. Judge Page,

Circuit Judge, in his opinion overruling such defense, stated at page 959:

"It is not to be believed, except on the clearest evidence, that Congress, when it authorized the incorporation of the defendant under the general laws of the District of Columbia, to forward a specific, limited, and *purely commercial undertaking*, intended to take away all those corporate rights, and leave those who might deal with the corporation no place to adjudicate those rights, except in and through the slow and cumbersome processes of the Court of Claims, where over \$10,000 is involved.

*"Nor is it to be believed that it was intended that a corporation, whose whole capital may, under the act, be owned by private individuals, could only be proceeded against in a jurisdiction established solely for the adjustment of claims against the United States."*

The identical question was again raised in the case of

*Pope vs. United States Shipping Board Emergency Fleet Corporation*, 269 Fed. 319.

Judge Call citing the case of

*Bank of United States vs. Planters Bank of Georgia*, *supra*.

and case of

*Sales vs. United States*, 234 Fed. 842, held the corporation to be a separate entity and not a governmental department.

In the case of

*Federal Sugar Refining Company vs. United  
States Sugar Equalization Board, Inc.*, 268  
Fed. 575,

the defendant was a corporation organized under the laws of Delaware, incorporated by the direction of the President, with all its stock owned solely by the government, seeking to evade liability on the ground of government immunity from suit. In sustaining demurrer to such defense Judge Mayer stated at page 587, as follows:

“The very incorporation of defendant demonstrates that the ordinary methods of transacting business by executive departments were inadequate, and doubtless subject to embarrassment by a maze of unworkable statutes and regulations, and that the elastic powers of a business corporation would enable the purchase and sale of sugar to be engaged in with the same facility as such transactions ordinarily go forward at the hands of individuals or business corporations. Such an incorporation was undoubtedly a practical and helpful instrumentality for doing the work with which the government was confronted; but it is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and be able to contract with others, or to injure others, confident that

no redress may be had against it as matter of right, but only, if at all, as matter of the favor of the sovereign."

We feel that his comment directed toward the activities of the sugar corporation applies equally as well to the activities of the Emergency Fleet Corporation.

In the case of

*Sales vs. the United States*, 234 Fed. 842, an employee of the Panama Railroad Company was indicted for conspiracy to defraud the United States on the theory that he had defrauded the railroad company, which company was owned entirely by the United States Government. The theory of the United States was that the Panama Railroad Company is a governmental department and that the defendant was an officer of the United States. The United States was the owner of the whole capital stock of the railroad company, absolutely dominating it and solely interested in its profits and losses. Circuit Judge Ward in his opinion held that a conspiracy though proved against the railroad company would not be conspiracy against the United States, stating as his reasons that although the government absolutely owns the Panama Railroad Company and is the only person profiting or losing by its activities, still the railroad company sues and is sued, just like any other corporation, in its own name. While the foregoing case does not pass upon the status of the Emergency Fleet Corporation, yet



the reasoning applies equally as well to the case at bar.

As a further and almost conclusive argument that the Emergency Fleet Corporation is not in fact a governmental department, or arm, we cite the case of

*United States vs. Strang*, 6 Advance Opinions U. S. Supreme Court, page 174;

we quote from the opinion of Mr. Justice McReynolds, at page 175:

“Counsel for the government maintain that the Fleet Corporation is an agency or instrumentality of the United States, formed only as an arm for executing purely governmental powers and duties vested by Congress in the President, and by him delegated to it; that the acts of the Corporation within its delegated authority are the acts of the United States; that therefore, in placing orders with the Duval Company in behalf of the Fleet Corporation, while performing the duties as inspector, Strang necessarily acted as agent of the United States.

“The demurrer was properly sustained.

“As authorized by the Act of September 7, 1916 (39 Stat. at L. 728, Chap. 451, Comp. Stat. 8146a, Fed. Stat. Anno. Supp. 1918, p. 785), the United States Shipping Board caused the Fleet Corporation to be organized (April 16, 1917) under laws of the District of Columbia with \$50,000,000 capital stock, all



owned by the United States, and it became an operating agency of that Board. Later, the President directed that the Corporation should have and exercise a specified portion of the power and authority in respect of ships granted to him by the Act of June 15, 1917 (40 Stat. at L. 182, chap. 29), and he likewise authorized the Shipping Board to exercise through it another portion of such power and authority. See *The Lake Monroe (Re United States)*, 250 U. S. 246, 252, 63 Ld. ed. 962, 966, 39 Sup. Ct. Rep. 460. The Corporation was controlled and managed by its own officers, and appointed its own servants and agents, who became directly responsible to it. Notwithstanding all its stock was owned by the United States, *it must be regarded as a separate entity*. Its inspectors were not appointed by the President, nor by any officer designated by Congress; they were subject to removal by the Corporation only, and could contract only for it. In such circumstances we think they were not agents of the United States within the true intendment of Sec. 41."

We are not unmindful of the holding of this Court in

*Ballaine vs. Alaska Northern R. R. Co.*, 259 Fed. 183.

But we feel that the wide difference between the act authorizing the acquisition of the Alaska Northern R. R. and the act creating the Emergency Fleet Cor-

poration offers adequate grounds for distinguishing the two situations.

Viewing this controversy from the inception of the bill creating the Emergency Fleet Corporation to the present day, we find Congress contemplating the formation of a separate entity—a commercial proposition. The act actually created a separate entity, capable of suing and being sued, with 49% of its stock capable of being owned by private individuals; a later act of Congress declared it a government establishment only for a particular purpose. The corporation itself has sued in its own name, (*United States Shipping Board Emergency Fleet Corporation vs. Kinney*, 254 U. S. 663).

A great mass of judicial opinion has declared it to be a separate entity. With such an array of evidence we are drawn to the irresistible conclusion that the corporation is in truth a separate entity and not a governmental department. That being a separate commercial entity, it should litigate its controversies in its own name and that discretion or authority to bring suits otherwise does not reside elsewhere.

## II.

In answer to the third contention of plaintiff in error we feel that counsel have mistaken the import of the sections of the Shipping Act of 1920, quoted in their brief. The provisions of Section 2 of that act which counsel contend repealed the act creating the Emergency Fleet Corporation, and

which they contend transferred to the United States Shipping Board all rights, interests, remedies, etc., of the Emergency Fleet Corporation, as well as the adjusting of all claims arising out of dealings had by the Corporation, do not in fact apply in any sense of the word to the Emergency Fleet Corporation.

A careful reading of the Act of June 5, 1920, discloses no evidence whatever of any intent to repeal Section 8146-F, U. S. Comp. Statutes annotated, being Sec. 11 Shipping Act 1916, the section under which the Emergency Fleet Corporation was created.

In the repealing section of the act of June 5, 1920, the only reference made to the shipping act of Sept. 7, 1916, is that Sections 5, 7 and 8 thereof are repealed.

The sections so repealed by the act of June 5, 1920, made no reference whatever to the Emergency Fleet Corporation. Section 5 of the Act of Sept. 7, 1916, merely authorized the Shipping Board to have constructed and equipped, or to purchase, lease or charter or repair certain vessels. No reference whatever is made to the creation of the Emergency Fleet Corporation.

Section 7 of said act provided merely for the sale, lease or charter of any such vessels to a citizen of the United States. Section 8 provided for the method of selling vessels unfit for service. Neither said section 7 or 8 refer in any manner to the Emergency Fleet Corporation.

Certainly there are no expressed terms in the Act of June 5, 1920, repealing Section 11 (8146-F, U. S. Comp. Statutes annotated) of the act of Sept. 7, 1916, and in the absence of expressed terms the presumption at law is that no repeal was intended.

36 Cyc. 1071.

Not only did the act of June 5, 1920, contain no expressed terms repealing the act creating the Emergency Fleet Corporation, but on the contrary it expressly provided for the continued existence of the Emergency Fleet Corporation.

See Section 12 and Section 35, act of June 5, 1920.

The sections quoted by plaintiff in error refer and apply only to the sections repealed, to-wit, sections 5, 7 and 8, of Shipping Act of 1916, and hence provide only for adjustment of disputes arising under those provisions.

Therefore the third contention of plaintiff in error is based upon a mistaken interpretation of Sec. 2 of the Act of June 5, 1920.

## CONCLUSION.

Viewing this whole question from a common-sense standpoint, what valid reason is there why the Emergency Fleet Corporation cannot bring this suit in its own name? It is capable of suing and being sued. It alone participated in the business dealings out of which this controversy arose. If it has a valid claim, it can bring its own suit for the enforcement of its rights. If the defendants in error have a valid counter-claim they can then assert it against the party with whom they dealt. By such a proceeding the interests of both the United States and the Emergency Fleet Corporation would be protected and the defendants in error would not be subjected to the cumbersome and uncertain if not impossible procedure of proving their claims against the United States. Honorable and common justice would thus be preserved to all the parties concerned.

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WM. G. LONG,

*Attorneys for Defendants in Error.*

Italics in this brief are ours.





# In the United States Circuit Court of Appeals

For the Ninth Circuit

---

THE UNITED STATES OF AMERICA,  
*Plaintiff in Error,*  
vs.  
J. J. MATTHEWS and MAUDE K. MATTHEWS,  
Husband and Wife,  
*Defendants in Error.*

---

Upon Writ of Error to the United States District  
Court of the Western District of Washington,  
Northern Division.

---

REPLY BRIEF OF PLAINTIFF IN ERROR

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---

## REPLY BRIEF OF PLAINTIFF IN ERROR

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The defendants in error in their brief contend and attempt to show that the United States Shipping Board Emergency Fleet Corporation was a commercial venture; that it was purely a commercial venture on the part of the United States and did not act as a governmental agency. It is the purpose of this brief to review the cases therein cited and to show that the Emergency

Fleet Corporation was nothing if not a governmental agency.

The first case cited is the *Bank of the United States vs. Planters Bank of Georgia*, 9 Wheat. 906, 6 Law Ed. 244, a decision which we do not believe is applicable here, for, in the first place, Congress did not strip itself of its sovereign character when it authorized the United States Shipping Board to create the United States Shipping Board Emergency Fleet Corporation under the Shipping Act of 1916. It did not in any sense become a partner in a trading company—it simply appointed an agent or arm to carry out governmental functions. By Section Eleven, it is provided that the Shipping Board may form under the laws of the District of Columbia, a corporation to carry out the purposes of that Act.

Article I, Section Eight, subdivision 17 of the Constitution of the United States provides that the exclusive jurisdiction over the District of Columbia is granted to Congress.

In *Metropolitan Railway Company v. District of Columbia*, 132 U. S. 1, 33 Law Ed. 231, it is held that the District of Columbia is a mere municipality acting under the laws of Congress for the



purpose of carrying on the civic functions of the seat of government.

“We are of the opinion that the corporate capacity and corporate liabilities of the District of Columbia remain as before, and that its character as a mere municipal corporation has not been changed. The mode of appointing its officers does not abrogate its character as a municipal body politic. \* \* \* All municipal governments are but agencies of the superior power of the State or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior Legislature sees fit to confer upon them. The form of those agencies and the mode of appointing officials to execute them are matters of legislative direction.”

Under this decision, the District of Columbia is nothing but an agency of the United States. It is not a state and has none of the attributes of a state, much less of a sovereignty.

Under the general incorporation laws of the District of Columbia, 31 Statutes at Large, p. 1285, Sec. 607, Congress provided for the formation of corporations within the District of Columbia, and that they should be capable “of suing and being sued in any court of law and equity in the district.” We have been unable to find any decision

which enlarges the power granted to corporations of the District of Columbia to be sued in any other place than in the District of Columbia. It may be argued that a corporation of the District of Columbia would be classed the same as a state corporation, but the corporation of the District of Columbia is the creation of a municipality and we are aware of no rule of law which gives to that class of corporations the same rights and privileges that belong to a corporation of a sovereign state.

*Sloan Shipyards Corporation v. U. S. S. B. E. F. C.*, 268 Fed. 624;

*Astoria Marine Iron Works v. U. S. S. B. E. F. C.*, 270 Fed. 635.

Suits can only be maintained against the United States in the courts upon which Congress has conferred such jurisdiction.

*Minnesota v. Hitchcock*, 185 U. S. 373, 46 Law Ed. 954;

*N. P. Railway Co. v. North Dakota*, 250 U. S. 135;

*Dakota Central Telephone Co. v. State of South Dakota*, 250 U. S. 163.

Suit cannot be maintained against the agent of a state without its consent.

*Murray v. Wilson Distilling Co.*, 213 U. S. 151, 53 L. Ed. 742;

*Smith v. Reeves*, 178 U. S. 436, 44 L. Ed. 1140;

*Hagood v. Southern*, 117 U. S. 52, 29 L. Ed. 805.

The *Murray v. Wilson Distilling Co.*, *supra*, is in point in this case, in that the State of South Carolina, under its dispensary law, had provided that suits could only be brought against it in state courts, and the Supreme Court held that this was a valid exercise of its sovereign power. It is our contention that when Congress designated the incorporation of the Emergency Fleet Corporation under the laws of the District of Columbia it had in mind the provision that it was suable in the courts of the District of Columbia.

In *Commonwealth Finance Corporation v. Landis*, 261 Fed. 440, cited by defendants in error shows that this case was decided November 7, 1919, that the only law considered by the court in its decision was the Shipping Act of 1916, yet we find

“The Fleet Corporation may be acting as such agent of the United States, or may not be so acting, or it may so act in some of its activities, and not in others. It follows from this that when it is acting as the United States, and such of its property and assets as are in the actual use of the United States, neither it as such agent nor such property

can be drawn into or jeopardized by disputes between private parties.”

In the present case there is nothing to show, even if we grant the contention of the defendants, that this case at bar does not come within the exception mentioned in the above decision, that the corporation was at that time acting for the United States, on the other hand the complaint so alleges, that it was the money of the United States that was paid.

In *Gould Coupler Co. v. U. S. S. B. E. F. C.*, 261 Fed. 716, decided December 9, 1919, the basis of that decision was the Shipping Act of 1916; and as we read it, the principal ground upon which it was decided was that under that Act the ships of the Fleet Corporation were subject to arrest.

By the Act of Congress of March 3, 1920, known as the Suits in Admiralty Act, this provision is repealed and provides:

“That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such



corporation, shall hereafter, in view of the provision herein made for a libel *in personam*, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company."

So that this opinion is of no value here.

In *American Cotton Oil Co. v. U. S. S. B. E. F. C.*, 270 Fed. 296, the question here presented was not considered, nor was the Merchant Marine Act of 1920, or any of the acts subsequent to the Shipping Act of 1916, although decided January 15, 1921, but the court does express its doubt as to whether the property of the corporation could be sold on execution.

In *Lord & Burnham Co. v. U. S. S. B. E. F. C.*, 265 Fed. 955, decided April 27, 1920, the Act of June 5, 1920, was not considered.

In *Pope v. U. S. S. B. E. F. C.*, 269 Fed. 319, decided April 15, 1915, the court grounds its decision on the *Salas* case, 234 Fed. 842, and refused to follow the *Ballaine* case, 259 Fed. 183, decided by this court.

In *Federal Sugar Refining Co. v. United States Sugar Equalization Board*, 268 Fed. 575, was a corporation that was formed not even by express



direction of Congress so that the principles laid down there would not apply to this case.

In *Perna v. U. S. S. B. E. F. C.* 266 Fed. 896, the court bases its decision on the *Gould Coupler Co.* case, *supra*, and the *Employer's Liability Corporation* case, 261 Fed. 716, both of which decisions were rendered under the Shipping Act of 1916.

In the *Matter of the Eastern Shore Shipbuilding Corporation, Bankrupt*, the opinion by the Circuit Court of Appeals, 2d Circuit, decided June 15, 1921, is an opinion which does not discuss the question involved in this case, except that it holds that the Emergency Fleet Corporation was an industrial corporation. One of the basic grounds for this decision was that the corporation, organized under the National Bank Act, does not become immune from suit by reason of the fact that it is an agent of the Government. We might add that Congress specifically provided that a national bank could be sued, but only in Federal Courts.

It will be thus seen that all of the above cases which were cited by defendants in error were decided only with reference to the Shipping Act of 1916. They all lose sight of the fact that this corporation was not organized until April 16, 1917,

after the United States entered the war. In this connection, we also desire to call attention that Congress in the original Act provided that within five years after the war was over this corporation should be dissolved — a strange provision if an industrial corporation organized, as defendants in error would have us believe, for profit. This Act also provides that this corporation shall report to Congress.

We have already quoted in our opening brief from the Shipping Act and the Merchant Marine Act to show that it was the declared intention of Congress to form a naval auxiliary and naval reserve as part of the national defense.

An examination of the Acts of Congress subsequent to 1916 dealing with the Merchant Marine strengthens our contention that it was the intention of Congress that the Emergency Fleet Corporation was to be a governmental arm or agent.

The Suits in Admiralty Act of March 9, 1920, provided that no vessel of which the United States is the owner or in which the United States or its representatives owns the entire capital stock, shall be subject to arrest and seizure, Section 9 of the original act having provided that they should be

subject to the same laws as private vessels. This statute was not in effect at the time of the controversy which arose out of the *Lake Monroe Case*, 250 U. S. 246, 63 L. Ed. 962.

The Emergency Shipping Act of June 15, 1917, empowered the President, among other things to buy, contract, equip and operate ships, and authorized the President to use any agent or agency as he might determine from time to time, and authorized the Emergency Fleet Corporation to spend any money turned over to it. By Executive Order of July 11, 1917, the President designated the Shipping Board and the Emergency Fleet Corporation to exercise the power conferred upon him in this Act.

The Act of April 22, 1918, provided the method by which the United States should declare and pay for transportation facilities around shipyards, and authorized the President to exercise the power and authority therein given through such agency as he might determine. This authority was delegated to the Emergency Fleet Corporation by Executive Orders of June 18, 1918, and December 3, 1918.

The Emergency Fleet Corporation was also dele-

gated by the President to carry out the provisions of the Emergency Shipping Fund Act of Congress of November 4, 1918, one of the provisions of which was that the War Department should not be charged for charter hire of vessels.

The Act of March 1, 1918, known as the Housing Law appropriated fifty million dollars to the Emergency Fleet Corporation for the housing and caring for employees of shipyards in which ships of the United States were being constructed.

The Act of July 11, 1918, empowered the Emergency Fleet Corporation to condemn property for use in ships of the United States.

By Executive Order of August 11, 1919, the Emergency Fleet Corporation was delegated by the President, under the Sundry Civil Expenses Act of July 19, 1919, to dispose of "material" and "plant."

The Urgent Efficiency Act for the year ending June 30, 1918, provided that the Emergency Fleet Corporation should be considered a government establishment.

Congress, by the Act of October 23, 1918, amended Section 35 of the Criminal Code so as to include theft of property from any corporation in which the United States holds stock, which amend-

ment was not in force at the time the *Strange* case was tried in the lower court and the Supreme Court did not consider it when it rendered the decision.

We do not believe that anyone can read the various Acts of Congress from the Shipping Act of 1916 on, and successfully contend that the Fleet Corporation is engaged in a purely commercial venture, a business proposition, and not a governmental agency. The whole scope of its activities is surrounded by and interwoven in functions which could only be formed by the United States.

Taking up the Merchant Marine Act, we find by Section 4 that all vessels and other property or interests of whatsoever kind, including vessels and property in course of construction or contracted for, under the various acts of Congress, are transferred to the Shipping Board; and we find by Section 2 the repeal of all the Acts above quoted. Section 14 provides that all money realized from the sale of all these various kinds of property should be turned into the Treasury of the United States. Subdivision (c) of Section 2 also provides that the Shipping Board shall adjust, settle and liquidate all matters, but reserves the right for any



party dissatisfied with any decision of the Board to have the same right to sue the United States.

In conclusion, we call attention of the Court to the fact that the complaint alleges that this money was paid by the United States, and that there is nothing in the record to indicate that the transactions involved were not purely governmental transactions, and that the cases of *Sloan Shipyards Corporation v. U. S. S. B.*, *supra*, in which decision Judge Cushman concurred with Judge Neterer; *Astoria Marine Iron Works v. U. S. S. B.*, *supra*; *Keely v. Kerr*, 270 Fed. 374; and *Ballaine v. Alaska Northern Railway*, 259 Fed. 183; correctly state the law; and that the judgment of the lower court should be reversed.

Respectfully submitted,

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

JOHANNA NELSON,

Plaintiff in Error,

vs.

W. W. CASEY, HENRY SHATTUCK and ALLEN  
SHATTUCK,

Defendants in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court of the  
District of Alaska, Division No. 1.

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FILED  
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F. D. MONCKTON  
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**United States**  
**Circuit Court of Appeals**  
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1977-A.

JOHANNA NELSON,

Plaintiff,

vs.

W. W. CASEY, HENRY SHATTUCK and  
ALLAN SHATTUCK,

Defendants.

**Complaint.**

Plaintiff herein complains of defendants, and for her cause of action alleges:

**I.**

That plaintiff is, and ever since the 4th day of October, 1915, has been, the owner of Lots Nine (9) and Ten (10), in Block Two Hundred Thirteen (213) of Casey-Shattuck Addition to the city of Juneau according to the recorded plat thereof; that said lots on and prior to the 26th day of September, 1918, were the place of residence and abode for plaintiff and her family; that plaintiff had on such lots on and prior to the said 26th day of September, 1918, two houses built for and used as residences, and the grounds about which and upon said lots were beautified with gardens and improved with the planting

of berry bushes and the erection and maintenance of chicken-houses and chicken fences, and the said lots were enclosed with picket fence; that said houses were well stocked with household furniture, utensils, stoves, beds, bedding and kindred necessities and luxuries usually found in well-equipped homes; that said lots and improvements thereon, including said houses, were on the said 26th day of September, 1918, of the value of Six Thousand Five Hundred Dollars (\$6,500.00), and the furniture and [1\*] other personal property above referred to in said houses were of the value of Two Thousand Five Hundred Dollars (\$2,500.00).

## II.

That a certain stream known as Gold Creek is a mountain stream, both sides of which, as well as both sides of the various tributaries of which, consist of, or are formed by very steep mountains rising to an average elevation of some three thousand (3,000) feet above the creek-bed, by reason of which fact, heavy rains would, and actually did, cause in said creek, periodically, sudden freshets of great magnitude and violence; that that part of the city of Juneau known as Casey-Shattuck Addition consists principally of a delta of low ground formed by said Gold Creek and sloping towards the southwest and over said delta and flowed through numerous channels from the narrow gorge immediately to the north of said Casey-Shattuck Addition, and that, until the course of said Gold Creek was obstructed and changed by defendants, as hereinafter set out, the said stream

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\*Page-number appearing at foot of page of original certified Transcript of Record.



flowed in a general southwesterly direction over said delta and, in case of freshets, said stream had opportunity to readily spread out, and did spread out, over said delta and flowed through numerous channels westerly of and away from plaintiff's said premises.

### III.

That heretofore, to wit, during the year 1914, the defendants herein, for their own use and benefit, and for their own purposes and for the purpose of reclaiming for themselves from the waters of Gold Creek certain tracts of land on the said delta and in the said Casey-Shattuck Addition, and for the purpose of making such lands suitable and marketable for residence purposes, undertook to change, and did change, the [2] course of said stream, below said gorge and where it flowed over said delta, from a southwesterly to a southerly direction, and to a position where it was by said change caused to flow adjacent to the aforementioned lots of this plaintiff and that at the time and by the same means, and for the same purpose, defendants undertook to, and did, confine the course of said stream to a channel too narrow and too shallow to accommodate and convey safely all the water which might and would flow through said stream during the periods of great precipitation of rain and great freshets.

### IV.

That for the purpose of so changing and confining the channel of said stream, defendants erected bulkheads or obstructions in and across the old channel of said stream so as to divert the water away from the old channel and force the water of said stream

to flow in a new channel and in a southerly direction, adjacent to plaintiff's lots above described, and for the purpose aforesaid defendants undertook to erect, and did erect on both sides of the new channel, bulkheads or embankments; that the embankments so erected by defendants on the easterly side of said new channel and at a point where said new channel runs adjacent to plaintiff's lots, and for several hundred feet northerly therefrom, were unskillfully and negligently constructed too weak and inadequate to withstand the force of the water which might and would likely come down said channel during freshets or during such periods of heavy downpour of rain on the watershed of said stream, as from time to time naturally and generally occurred and might naturally be expected to occur in the future. That by reason of said facts plaintiff's property aforesaid was by defendants' said wrongful acts exposed to the danger of [3] being washed away by the waters thrown or forced against said property by reason of the various embankments or bulkheads erected by defendants across and in the old channel of said stream to prevent said stream from spreading in the manner it did before said obstructions, embankments or bulkheads were erected as above described.

#### V.

That at the time plaintiff became the owner of said lots, and ever after, she was ignorant of the change of the course of the said stream and was ignorant of the fact that prior to the erection and maintenance of said obstructions and embankments by de-

fendants the natural course of said Gold Creek was at other and different places and that during freshets the said stream naturally spread over a large area and flowed through several channels, as above set out; that plaintiff was at all times herein mentioned ignorant of the weak and inadequate condition of the said artificial embankments adjacent to her said lots and to the northerly therefrom and of the negligent condition in which the same had been constructed and maintained, and knew nothing of the danger to which she, her family and property were subjected by reason of the defendants' said negligent and wrongful acts above described.

#### VI.

That defendants at all times herein mentioned knew, or by the exercise of ordinary and reasonable care and intelligence would have known, that Gold Creek was a mountain stream subject to violent freshets from time to time; knew that the inevitable effect of the bulkheads or embankments erected by defendants across the old channel and on the westerly side of said stream was to obstruct the natural course and tendency of the water of said stream aforesaid and that said bulkheads or [4] embankments would, and did, divert and force the waters of said stream, with great violence, against plaintiff's property aforesaid; that the said new channel constructed by defendants was too small to accommodate and safely convey the water of said stream during the periodical freshets to which said stream was subject; that the aforesaid bulkhead or embankment on the easterly side of said channel, adjacent to plaintiff's

property and for several hundred feet northerly therefrom, was, at all times herein mentioned, too weak, flimsy and inadequate to withstand the force of the water in said stream which would naturally be thrown against it, in case of freshets, after the said bulkhead or embankments in the old channel and on the westerly side of said new channel were so erected by defendants as aforesaid; that by reason of said facts above set out, plaintiff's said property was at all times exposed to the danger of being washed away by freshets in said stream; and plaintiff alleges that defendants were grossly negligent in this, that they failed to construct and maintain on the easterly side of said stream adjacent to plaintiff's said property and for several hundred feet northerly therefrom, a bulkhead or embankment adequate to protect plaintiff's said property against any water that would be forced against said bulkhead or embankment by the said change in the course of said stream or by the erection or maintenance of a bulkhead, embankments or obstructions in and across the old channel of said stream, preventing said stream, as aforesaid, from spreading in a westerly direction in event of freshets in the same manner that the stream was wont to do before the said change in the course of said stream was caused by defendants as aforesaid.

## VII.

That heretofore, to wit, on the 26th day of September, 1918, while plaintiff was such owner of said property above described and while she was residing thereon with her family, [5] a downpour of rain



occurred which caused a freshet in said Gold Creek, and that then and there, by reason of the negligent and wrongful acts of defendants above set out, the waters in said stream were prevented from spreading freely in a southwesterly direction and were forced up against the said artificial and inadequate embankments adjacent to plaintiff's said lots and northerly therefrom, which embankments, by reason of said weakness and inadequacy, gave way under the force of said waters, which latter then and there necessarily, by reason of defendants said wrongful acts above described, washed away both of plaintiff's said houses above described and destroyed all of the improvements on said lots and washed away all soil therefrom and left nothing but a bed of boulders, establishing a new stream where plaintiff's home, up to the said 26th day of September, 1918, had been, thereby and thus completely destroying the value of said real property, with all of the appurtenances thereunto belonging; that much of plaintiff's personal property in said residences was also then and there wholly destroyed by the said action of the water, and in the effort to save the furnishings and equipment of said residences from complete destruction what was thus saved was greatly damaged; that said injury and damage to plaintiff's personal property in said residences was and is Two Thousand Twenty-four Dollars (\$2,024).

#### VIII.

That, by reason of the destruction of her home and property by the wrongful acts of defendants in the manner and as above alleged, plaintiff became,



and was, greatly perturbed for the safety of herself and family and suffered great mental anguish, and was injured and damaged in her person and property [6] in the sum of Nine Thousand Dollars (\$9,000.00), all due to, and caused by, the negligent and wrongful acts of defendants above described.

WHEREFORE, plaintiff demands judgment against the defendants, and each of them, in the sum of Nine Thousand Dollars (\$9,000.00), together with her costs and disbursements herein.

JOHN RUSTGARD,  
Attorney for Plaintiff.

United States of America,  
Territory of Alaska,—ss.

Johanna Nelson, being first duly sworn, deposes and says: That she is the plaintiff named in the above-entitled action; that she has read the foregoing complaint, knows the contents thereof, and that she believes the same to be true.

JOHANNA NELSON.

Subscribed and sworn to before me this 21st day of July, 1920.

[Notarial Seal]

JOHN RUSTGARD,  
Notary Public for Alaska.

My commission expires Oct. 8, 1922.

Filed in the District Court, District of Alaska,  
First Division. Jul. 21, 1920. J. W. Bell, Clerk.  
By V. F. Pugh, Deputy. [7]

In the District Court for the District of Alaska,  
Division No. 1, at Juneau.

No. 1977-A.

JOHANNA NELSON,

Plaintiff,

vs.

W. W. CASEY, HENRY SHATTUCK and AL-  
LEN SHATTUCK,

Defendants.

**Demurrer.**

Come now the defendants above named by their attorney, H. L. Faulkner, and demur to the complaint of the plaintiff on file herein, upon the ground that said complaint does not state facts sufficient to constitute a cause of action.

H. L. FAULKNER,

Attorney for Defendants.

Filed in the District Court, District of Alaska,  
First Division. Aug. 19, 1920. J. W. Bell, Clerk.  
By V. F. Pugh, Deputy. [8]

In the District Court for the District of Alaska,  
Division No. One, at Juneau.

No. 1977-A.

JOHANNA NELSON,

Plaintiff,

vs.

W. W. CASEY, HENRY SHATTUCK and AL-  
LEN SHATTUCK,

Defendants.

**Order Sustaining Demurrer and Fixing Time of  
Amendment.**

This matter coming on regularly to be heard upon the demurrer of the defendants above named to the complaint of the plaintiff, and the plaintiff being represented by her counsel, John Rustgard, and the defendants by their counsel, H. L. Faulkner, and the matter having been heretofore argued and submitted to the Court,—

IT IS HEREBY ORDERED that the said demurrer be, and the same is hereby sustained, and the plaintiff is allowed until October 20th in which to amend her complaint in accordance with the opinion of the Court filed herein on October 2, 1920.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska,  
First Division. Oct. 4, 1920. J. W. Bell, Clerk.  
By ———, Deputy.

Entered Court Journal No. Q, page 90. [9]

In the District Court for the District of Alaska,  
Division No. One, at Juneau.

No. 1977-A.

JOHANNA NELSON,

Plaintiff,

vs.

W. W. CASEY, HENRY SHATTUCK and AL-  
LAN SHATTUCK,

Defendants.

**Ruling on Demurrer.**

The complaint in this case alleges, (1) that on and at all times since the 4th day of October, 1915, plaintiff has been the owner of certain property in what is known as the Casey-Shattuck addition to the city of Juneau; (2) that during the year 1914 the defendants "for their own benefit and for their own purposes" changed the course of Gold Creek thereby causing said creek to flow adjacent to the said lots of the plaintiff; (3) that said change was accomplished by the building of an artificial channel for said Gold Creek, which said artificial channel was negligently constructed and of insufficient capacity; (4) that on the 26th day of September, 1918, a downpour of rain occurred which caused a freshet in said Gold Creek, and "that then and there, by reason of the negligent and wrongful acts of defendants above set out, the waters in said stream were prevented from spreading freely in a south-westerly direction and were forced up against the

said artificial and inadequate embankments adjacent to plaintiff's said lots and northerly therefrom, which embankments, by reason of said weakness and inadequacy, gave way under the force of said waters, which latter then and there necessarily, by reason of defendants' wrongful acts above described, washed away both of plaintiff's said houses," and did the damage sued for in the complaint.

To this complaint a demurrer was interposed on the grounds [10] that the said complaint did not state facts sufficient to constitute a cause of action. The demurrant makes the point that as it appears from said complaint that the embankments were erected in the year 1914, and as defendant did not purchase her property until October, 1915, and as it further appears that the damage was not done until 1918, and as there is no allegation whatsoever that after the course of the creek was changed by the embankments so alleged to have been erected the defendants did anything whatsoever towards the operation, repair or maintenance of the same, the complaint states no facts upon which a liability could be predicated.

It would seem that the point is well taken. For aught that appears in the complaint the defendants may in the year 1914 have changed the course of the creek for purposes of their own, and those purposes may have been accomplished and the defendants have lost all interest in the creek or any property adjacent thereto, or to be benefited thereby. Surely they would not be liable forever afterwards because on a certain date they changed the course



of a creek. It seems to me that they would be liable only during such time as they were maintaining the obstructions complained of.

Plaintiff as meeting this contention of the demurrant cites the case of Arave vs. Idaho Canal Co., 46 Pac. 1024. A casual examination of that case will show that it was a suit for damages caused by an obstruction coupled with a prayer for an injunction "that the defendant be perpetually restrained and enjoined from maintaining said canal." Manifestly, then, there must have been an allegation in the complaint that the plaintiffs not only had maintained the canal complained of, but were still maintaining it. Counsel calls attention to the following language in the decision:

"Appellant's claim that the corporation defendant is not called upon to consider or respect the rights of settlers along the line of its canal, who have made such settlement subsequent to the location of the canal, is not only unsupported by law, but is repugnant to every principle of equity and good conscience. [11]

The doctrine there announced may be fully conceded, and yet such language is very far from declaring that a company or person which has not "maintained" an obstruction is liable to settlers along the canal.

The case of Free vs. Parr Shoals Power Co., 97 S. E. 243, is also cited by counsel for the plaintiff. An examination of that case shows that it was alleged in the complaint "that defendant was negligent in the construction *and operation* of said dam."

The case of Beauchamp vs. Taylor, 111 S. W. 609, is also relied upon by counsel for plaintiff, but it seems to me that that case is an authority more against the plaintiff than in her favor, for it is said in the opinion:

“Defendants demurred to the evidence, and here insist that their demurrer should have been given. Their contention is that plaintiff purchased the land with knowledge that defendants had constructed and were maintaining the levee, and therefore purchased it burdened with the levee. If the levee was not a lawful structure—that is, if it obstructed the flow of water in a natural channel—it was a nuisance, and while plaintiff cannot sue and recover for the erection of the nuisance, he is clearly entitled to recover any damage he may have sustained *by reason of its maintenance.*”

The statement of facts of the case shows that the plaintiff alleged that at the time of the injury the defendants in the case were still maintaining the levee.

If the defendants can be said to have been maintaining, at the time of the injury, the obstructions which are alleged to have caused the injury, it will be very easy to insert in the complaint a statement to that effect, but in the absence of such statement I do not think the complaint states facts sufficient.

The demurrer therefore will be sustained with leave to the plaintiff to amend her complaint.

Filed in the District Court, District of Alaska,  
First Division. Oct. 2. 1920. J. W. Bell, Clerk.  
By —————, Deputy. [12]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1977-A.

JOHANNA NELSON,

Plaintiff,

vs.

W. W. CASEY, HENRY SHATTUCK and AL-  
LAN SHATTUCK,

Defendants.

**Amended Complaint.**

Plaintiff herein complains of defendants, and for  
her cause of action alleges:

**I.**

That plaintiff is, and ever since the 4th day of  
October, 1915, has been, the owner of Lots Nine (9)  
and Ten (10), in Block Two Hundred Thirteen  
(213) of Casey-Shattuck Addition to the City of  
Juneau according to the recorded plat thereof; that  
said lots on and prior to the 26th day of September,  
1918, were the place of residence and abode for  
plaintiff and her family; that plaintiff had on such  
lots on and prior to the said 26th day of September,  
1918, two houses built for and used as residences,  
and the grounds about which and upon said lots  
were beautified with gardens and improved with the

planting of berry bushes and the erection and maintenance of chicken-houses and chicken fences, and the said lots were enclosed with picket fence; that said houses were well stocked with household furniture, utensils, stoves, beds, bedding and kindred necessities and luxuries usually found in well-equipped homes; that said lots and improvements thereon, including said houses, were on the said 26th day of September, 1918, of the value of Six Thousand Five Hundred Dollars (\$6,500.00), and the furniture and other personal property above referred to in said houses [13] were of the value of Two Thousand Five Hundred Dollars (\$2500).

## II.

That a certain stream known as Gold Creek is a mountain stream, both sides of which, as well as both sides of the various tributaries of which, consist of, or are formed by very steep mountains rising to an average elevation of some three thousand (3,000) feet above the creek-bed, by reason of which fact, heavy rains would, and actually did, cause in said creek, periodically, sudden freshets of great magnitude and violence; that that part of the city of Juneau known as Casey-Shattuck Addition consists principally of a delta of low ground formed by said Gold Creek and sloping towards the southwest and over which said Gold Creek flowed after it emerged from the narrow gorge immediately to the north of said Casey-Shattuck Addition, and that, until the course of said Gold Creek was obstructed and changed by defendants, as hereinafter set out, the said stream flowed in a general southwesterly



direction over said delta and, in case of freshets, said stream had opportunity to readily spread out, and did spread out, over said delta and flowed through numerous channels westerly of and away from plaintiff's said premises.

### III.

That heretofore, to wit, during the year 1914, the defendants herein, for their own use and benefit, and for their own purposes and for the purpose of reclaiming for themselves from the waters of Gold Creek certain tracts of land on the said delta and in the said Casey-Shattuck Addition, and for the purpose of making such lands suitable and marketable for residence purposes, undertook to change, and did change, the [14] course of said stream, below said gorge and where it flowed over said delta, from a southwesterly to a southerly direction, and to a position where it was by said change caused to flow adjacent to the aforementioned lots of this plaintiff, and that at the time and by the same means, and for the same purpose, defendants undertook to, and did, confine the course of said stream to a channel too narrow and too shallow to accommodate and convey safely all the water which might and would flow through said stream during the periods of great precipitation of rain and great freshets.

### IV.

That for the purpose of so changing and confining the channel of said stream, defendants erected bulkheads or obstructions in and across the old channel of said stream so as to divert the water



away from the old channel and force the water of said stream to flow in a new channel and in a southerly direction, adjacent to plaintiff's lots above described, and for the purpose aforesaid defendants undertook to erect, and did erect on both sides of the new channel, bulkheads or embankments; that the embankments so erected by defendants on the easterly side of said new channel and at a point where said new channel runs adjacent to plaintiff's lots, and for several hundred feet northerly therefrom, were unskillfully and negligently constructed too weak and inadequate to withstand the force of the water which might and would likely come down said channel during freshets or during such periods of heavy downpour of rain on the watershed of said stream, as from time to time naturally and generally occurred and might naturally be expected to occur in the future. That by reason of said facts plaintiff's property aforesaid was by defendants' said wrongful acts exposed to the danger of [15] being washed away by the waters thrown or forced against said property by reason of the various embankments or bulkheads erected by defendants across and in the old channel of said stream to prevent said stream from spreading in the manner it did before said obstructions, embankments or bulkheads were erected as above described.

V.

That at the time plaintiff became the owner of said lots, and ever after, she was ignorant of the change of the course of the said stream and was ignorant of the fact that prior to the erection and

maintenance of said obstructions and embankments by defendants the natural course of said Gold Creek was at other and different places and that during freshets the said stream naturally spread over a large area and flowed through several channels, as above set out; that plaintiff was at all times herein mentioned ignorant of the weak and inadequate condition of the said artificial embankments adjacent to her said lots and to the northerly therefrom and of the negligent condition in which the same had been constructed and maintained, and knew nothing of the danger to which she, her family and property were subjected by reason of the defendants' said negligent and wrongful acts above described.

## VI.

That defendants at all times herein mentioned knew, or by the exercise of ordinary and reasonable care and intelligence would have known, that Gold Creek was a mountain stream subject to violent freshets from time to time; knew that the inevitable effect of the bulkheads or embankments erected by defendants across the old channel and on the westerly side of said stream was to obstruct the natural course and tendency of the water of said stream aforesaid and that said bulkheads or [16] embankments would, and did, divert and force the waters of said stream, with great violence, against plaintiff's property aforesaid; that the said new channel constructed by defendants was too small to accommodate and safely convey the water of said stream during the periodical freshets to which said

stream was subject; that the aforesaid bulkhead or embankment on the easterly side of said channel, adjacent to plaintiff's property and for several hundred feet northerly therefrom, was, at all times herein mentioned, too weak, flimsy and inadequate to withstand the force of the water in said stream which would naturally be thrown against it, in case of freshets, after the said bulkhead or embankments in the old channel and on the westerly side of said new channel were so erected by defendants as aforesaid; that by reason of said facts above set out, plaintiff's said property was at all times exposed to the danger of being washed away by freshets in said stream; and plaintiff alleges that defendants were grossly negligent in this, that they failed to construct and maintain on the easterly side of said stream adjacent to plaintiff's said property and for several hundred feet northerly therefrom, a bulkhead or embankment adequate to protect plaintiff's said property against any water that would be forced against said bulkhead or embankment by the said change in the course of said stream or by the erection or maintenance of a bulkhead, embankments or obstructions in and across the old channel of said stream, preventing said stream, as aforesaid, from spreading in a westerly direction in event of freshets in the same manner that the said stream was wont to do before the said change in the course of said stream was caused by defendants as aforesaid.

## VII.

That prior to, at and after the turning of the

channel of said stream and the erection of said bulkheads or embankments aforesaid, defendants surveyed and platted the lands and premises [17] on both sides of said new channel and upon and over the said delta into building lots, streets and avenues, dedicated the said streets and avenues to public use as such and offered said lots for sale to the public, defendants being then and there the owners of said premises; that at the time of the erection of said bulkheads or embankments defendants sold a large number of said lots to many and diverse individuals, and for a long time thereafter and until the 26th day of September, 1918, did continue to offer for sale to the public the remainder of said tracts so surveyed and platted and did continue to sell lots from said tracts to divers and sundry individuals; and that before the said 26th day of September, 1918, a large number of said lots had been so purchased and large sums of money had been expended by said purchasers, not only in the purchase of said lots but in the erection and maintenance of residences, store buildings, gardens and other valuable and permanent improvements upon said lots; and that at great expense streets had been constructed and sidewalks built by the city of Juneau, a municipal corporation, upon said premises so dedicated as aforesaid, and up to and on the said 26th day of September were maintained by the said city at great expense; that a great many of said improvements had been so constructed and were so maintained on that portion of said delta on which, prior to the erection of said bulkheads



and embankments, the waters of said stream wont to flow and upon premises reclaimed by means of said bulkheads from the waters of said stream; that those who purchased said lots and constructed and or maintained said improvements did so on the assumption and under the belief, as defendants at all times well knew, that said bulkheads were permanent and adequate and would be maintained as such by defendants; that in case the said bulkhead on the westerly side of said new channel should be removed or should give way, large tracts of the premises so sold [18] and improved as aforesaid, would be inundated, destroyed and rendered useless, as defendants also at all times well knew; that by reason of said facts above set out it was the duty of defendants to at all times keep and maintain said bulkheads or embankments in good condition and repair, and in every way adequate to keep and restrain the waters of said stream within the said new channel and prevent said waters from flowing on or in any manner injuring the said adjoining premises or any premises reclaimed as aforesaid from the waters of said stream as aforesaid.

#### VIII.

That heretofore, to wit, on the 26th day of September, 1918, while plaintiff was such owner of said property above described and while she was residing thereon with her family, a downpour of rain occurred which caused a freshet in said Gold Creek, and that then and there, by reason of the negligent and wrongful acts of defendants above set out, the waters in said stream were prevented from spread-



ing freely in a southwesterly direction and were forced up against the said artificial and inadequate embankments adjacent to plaintiff's said lots and northerly therefrom, which embankments, by reason of said weakness and inadequacy, gave way under the force of said waters, which latter then and there necessarily, by reason of defendants' said wrongful acts above described, washed away both of plaintiff's said houses above described and destroyed all the improvements on said lots and washed away all soil therefrom and left nothing but a bed of boulders, establishing a new stream where plaintiff's home, up to the said 26th day of September, 1918, had been, thereby and thus completely destroying the value of said real property, with all of the appurtenances thereunto belonging; that much of plaintiff's personal property in said residences was also then and there wholly destroyed by the said action of the water, and in the effort to save the furnishings and equipment of said residences from complete [19] destruction what was thus saved was greatly damaged; that said injury and damage to plaintiff's personal property in said residences was and is Two Thousand Twenty-four Dollars (\$2,024).

### IX.

That, by reason of the destruction of her home and property by the wrongful acts of defendants in the manner and as above alleged, plaintiff became, and was, greatly perturbed for the safety of herself and family and suffered great mental anguish, and was injured and damaged in her person and

property in the sum of Nine Thousand Dollars (\$9,000.00), all due to, and caused by, the negligent and wrongful acts of defendants above described.

WHEREFORE, plaintiff demands judgment against the defendants, and each of them, in the sum of Nine Thousand Dollars (\$9,000.00), together with her costs and disbursements herein.

JOHN RUSTGARD,  
Attorney for Plaintiff.

United States of America,  
Territory of Alaska,—ss.

Johanna Nelson, being first duly sworn, deposes and says: That she is the plaintiff named in the above-entitled action; that she has read the foregoing amended complaint, knows the contents thereof, and that she believes the same to be true.

JOHANNA NELSON.

Subscribed and sworn to before me this 5th day of November, 1920.

[Notarial Seal] JOHN RUSTGARD,  
Notary Public for Alaska.

My commission expires Oct. 8th, 1922.

Copy of foregoing amended complaint received this 8th day of Nov., 1920.

H. L. FAULKNER,  
Atty. for Defts.

Filed in the District Court, District of Alaska,  
First Division. Nov. 8, 1920. J. W. Bell, Clerk.  
By V. F. Pugh, Deputy. [20]

In the District Court for the District of Alaska,  
Division No. One, at Juneau.

No. 1977-A.

JOHANNA NELSON,

Plaintiff,

vs.

W. W. CASEY, HENRY SHATTUCK and  
ALLEN SHATTUCK,

Defendants.

**Demurrer to Amended Complaint.**

Come now the defendants above named, by their attorney, H. L. Faulkner, and demur to the amended complaint of the plaintiff on file herein, on the ground that the same does not state facts sufficient to constitute a cause of action against the defendants, or either of them.

H. L. FAULKNER,  
Attorney for Defendant.

Copy received Nov. 12, 1920.

JOHN RUSTGARD,  
Atty. for Plaintiff.

Filed in the District Court, District of Alaska,  
First Division. Nov. 12, 1920. J. W. Bell, Clerk.  
By V. F. Pugh, Deputy. [21]

In the District Court for the District of Alaska,  
Division No. One, at Juneau.

No. 1977-A.

JOHANNA NELSON,

Plaintiff,

vs.

W. W. CASEY, HENRY SHATTUCK and  
ALLAN SHATTUCK,

Defendants.

**Order Sustaining Demurrer.**

This cause came duly on to be heard before the above-entitled court at Juneau, Alaska, on the 24th day of February, 1921, upon a general demurrer by defendants to plaintiff's amended complaint, John Rustgard, Esquire, appearing for plaintiff, and H. L. Faulkner, Esquire, appearing for defendants; and the cause having been duly submitted to the Court, and the Court having considered the same, and being duly advised in the premises, announced in open court on the 5th day of April, 1921, that the Court sustained the said demurrer;

NOW, THEREFORE, it is ORDERED that the defendants' general demurrer to plaintiff's amended complaint be and the same hereby is sustained, and that this order be entered *nunc pro tunc* as of April 5th, 1921.

Done in open court, this 11th day of May, 1921.

ROBERT W. JENNINGS,  
District Judge.

O. K.—H. L. FAULKNER,  
Atty. for Defendants.

Filed in the District Court, District of Alaska,  
First Division. May 11, 1921. J. W. Bell, Clerk.  
By V. F. Pugh, Deputy.

Entered Court Journal No. Q, page 262. [22]

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In the District Court for the District of Alaska,  
Division No. One, at Juneau.

No. 1977-A.

JOHANNA NELSON,

Plaintiff,

vs.

W. W. CASEY, HENRY SHATTUCK and  
ALLEN SHATTUCK,

Defendants.

**Judgment.**

The above cause having duly come on to be heard before the above-entitled court on the 24th day of February, 1921, upon a general demurrer by defendants to plaintiff's amended complaint, and the Court having on the 5th day of April, 1921, sustained the said demurrer and entered its order accordingly, and no further or other pleading having been filed by the plaintiff, and the plaintiff having, for the purpose of affording her relief by way of a



writ of error, moved that judgment be entered herein upon the pleadings;

NOW, THEREFORE, it is ADJUDGED that plaintiff take nothing by this action, and that the defendants have their costs and disbursements herein to be taxed by the clerk of this court.

Done in open court at Juneau, Alaska, this 11th day of May, 1921.

ROBERT W. JENNINGS,  
District Judge.

O. K.—H. L. FAULKNER,  
Atty. for Defendants.

Filed in the District Court, District of Alaska, First Division. May 11, 1921. J. W. Bell, Clerk. By V. F. Pugh, Deputy.

Entered Court Journal No. Q, page 263. [23]

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United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco, California.

JOHANNA NELSON,

Plaintiff in Error,

vs.

W. W. CASEY, HENRY SHATTUCK and  
ALLEN SHATTUCK,

Defendants in Error.

**Assignment of Errors.**

Comes now the above-named plaintiff in error, Johanna Nelson, and assigns the following errors

committed by the Court in the above-entitled cause and in the rendition of the judgment herein, the errors so assigned being the errors which the plaintiff in error intends to urge before the United States Circuit Court of Appeals of the Ninth Circuit, and are the errors relied upon for a reversal of the judgment herein.

#### ERROR NUMBER ONE.

The District Court for the Territory of Alaska, Division Number One, erred in sustaining the defendants' demurrer to plaintiff's complaint.

#### ERROR NUMBER TWO.

The District Court for the Territory of Alaska, Division Number One, erred in sustaining the defendants' demurrer to plaintiff's amended complaint.

#### ERROR NUMBER THREE.

The Court erred in holding and ruling that the plaintiff's complaint did not state facts sufficient to constitute a cause of action.

#### ERROR NUMBER FOUR.

The Court erred in holding and ruling that plaintiff's amended complaint did not state facts sufficient to constitute a cause of action.

#### ERROR NUMBER FIVE.

The Court erred in adjudging that plaintiff take nothing by this action and that defendants have their costs and disbursements therein. [24]

#### ERROR NUMBER SIX.

The Court erred in entering judgment herein in favor of defendants and against plaintiff.

WHEREFORE, the above-named plaintiff in error prays that the judgment herein entered on the 11th day of May, 1921, be reversed and that she have her costs and disbursements herein.

RODEN & DAWES,

Attorneys for Plaintiff in Error.

Copy received May 13, 1921.

H. L. FAULKNER,

Atty. for Defendants.

Filed in the District Court, District of Alaska, First Division. May 14, 1921. J. W. Bell, Clerk. By L. E. Spray, Deputy. [25]

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United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco, California.

JOHANNA NELSON,

Plaintiff in Error,

vs.

W. W. CASEY, HENRY SHATTUCK, and  
ALLAN SHATTUCK,

Defendants in Error.

**Petition for Writ of Error and Order Allowing  
the Same.**

To the Honorable ROBERT W. JENNINGS, Judge  
of the District Court for the Territory of Alaska,  
Division Number One:

Comes now the above-named Johanna Nelson, plaintiff in error herein, and complains that in the record and proceedings had in the District Court

for the Territory of Alaska, Division Number One, in the case of Johanna Nelson, Plaintiff, vs. W. W. Casey, Henry Shattuck, and Allan Shattuck, Defendants, and also in the rendition of the judgment in said cause in the District Court for the Territory of Alaska, Division Number One, on the 11th day of May, 1921, wherein the District Court of the Territory of Alaska adjudged that said plaintiff, Johanna Nelson, take nothing by said action and that the above-named defendants have their costs therein, manifest error hath happened, to the great damage of the said Johanna Nelson, as will more fully appear from the assignment of errors filed herewith;

WHEREFORE, Johanna Nelson prays for the allowance of a writ of error and for an order fixing the amount of the [26] bond in said cause, and for such other order and process as may cause the said error to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated the 14th day of May, A. D. 1921.

RODEN & DAWES,

Attorneys for Plaintiff in Error.

The above petition for writ of error is allowed, and the bond fixed at Two Hundred and Fifty Dollars (\$250.00), to be approved by the clerk of the above-entitled court.

And it is further ordered, that this cause be heard by the United States Circuit Court of Appeals of the Ninth Circuit in the city of Seattle at its session in that city in the month of September, A. D. 1921.

Dated the 14th day of May, A. D. 1921.

ROBERT W. JENNINGS,

Judge.

Service admitted May 13, 1921.

H. L. FAULKNER,

Atty. for Defendants.

Filed in the District Court, District of Alaska,  
First Division. May 14, 1921. J. W. Bell, Clerk.  
By L. E. Spray, Deputy.

Entered Court Journal No. Q. page 275. [27]

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United States Circuit Court of Appeals for the Ninth  
Circuit, Holden at San Francisco, California.

JOHANNA NELSON,

Plaintiff in Error.

vs.

W. W. CASEY, HENRY SHATTUCK, and  
ALLAN SHATTUCK,

Defendants in Error.

**Writ of Error.**

United States of America,—ss.

The President of the United States of America to  
the Honorable ROBERT W. JENNINGS,  
Judge of the District Court for the Territory  
of Alaska, Division Number One, GREETING:

Because in the record and proceedings, as also in  
the rendition of the judgment of a plea, which is in  
said District Court, Division Number One thereof,  
before you, between Johanna Nelson as plaintiff,



and W. W. Casey, Henry Shattuck and Allan Shattuck as defendants, a manifest error hath happened, to the great prejudice and damage of the said Johanna Nelson, as is set forth and appears by the petition herein.

We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the records and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this [28] writ, so as to have the same at said place and said circuit on or before thirty days from the date hereof, that the records and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 14th day of May, A. D. 1921.

Attest my hand and the seal of the District Court for the Territory of Alaska, Division Number One, at the clerk's office at Juneau on the day and year last above written.

[Seal]

J. W. BELL,

Clerk of the District Court for the Territory of Alaska, Division Number One.

Allowed this 14th day of May, A. D. 1921.

ROBERT W. JENNINGS,

District Judge.

Due service of the within and foregoing writ of error is acknowledged this 13th day of May, A. D. 1921.

H. L. FAULKNER,

Attorney for Defendants in Error.

Filed in the District Court, District of Alaska,  
First Division. May 14, 1921. J. W. Bell, Clerk.  
By L. E. Spray, Deputy. [29]

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United States Circuit Court of Appeals for the Ninth  
Circuit, Holden at San Francisco, California.

No. 1977-A.

JOHANNA NELSON,

Plaintiff in Error,

vs.

W. W. CASEY, HENRY SHATTUCK, and  
ALLAN SHATTUCK,

Defendants in Error.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS,  
that we, Johanna Nelson, as principal, and John Reck,  
as surety, are held and firmly bound unto the above  
named defendants in error, W. W. Casey, Henry  
Shattuck, and Allan Shattuck, in the sum of Two  
Hundred and Fifty Dollars (\$250), for the payment  
of which, well and truly to be made, we bind ourselves

and each of our heirs, executors and administrators, firmly by these presents.

The condition of this obligation is such that, whereas, the above-bounden Johanna Nelson has applied for an order granting a writ of error in the above-entitled cause from the United States Circuit Court of Appeals of the Ninth Circuit to the District Court of the Territory of Alaska, Division Number One, from a judgment entered in said cause on the 11th day of May, 1921;

NOW, THEREFORE, if the said writ of error shall issue and if the plaintiff in error shall prosecute her writ to effect, and answer all damages and costs, and if she shall fail to make her appeal good, then and in that case, this obligation shall be null and void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, we have set our hands and [30] seals this 13th day of May, A. D. 1921.

JOHANNA NELSON,  
By HENRY RODEN, (Seal)  
Her Attorney,  
Principal.  
JOHN RECK, (Seal)  
Surety.

United States of America,  
Territory of Alaska,—ss.

John Reck, being first duly sworn, deposes and says: That he is a resident of the city of Juneau, Alaska, over twenty-one years of age, and a banker by occupation; that he is worth the sum of Five Hundred Dollars (\$500) over and above his debts and liabilities and property exempt from execution; that he is

not a counsellor or attorney, marshal, clerk of any court or other officer of any court.

JOHN RECK.

Subscribed and sworn to before me this 13th day of May, 1921.

[Notarial Seal]

HENRY RODEN,

Notary Public in and for the Territory of Alaska.

My notarial commission expires July 24th, 1922.

The within bond is hereby approved.

ROBERT W. JENNINGS,

District Judge.

[Endorsed]: No. 1977-A. Bond on Appeal. Filed in the District Court, District of Alaska, First Division. May 14, 1921. J. W. Bell, Clerk. By L. E. Spray, Deputy. [31]

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United States Circuit Court of Appeals for the Ninth Circuit, Holden at San Francisco, California.

1977-A.

JOHANNA NELSON,

Plaintiff in Error,

vs.

W. W. CASEY, HENRY SHATTUCK, and AL-  
LAN SHATTUCK,

Defendants in Error.

**Citation on Writ of Error.**

The President of the United States to W. W. Casey, Henry Shattuck and Allan Shattuck, the Above-named Defendants in Error, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, within thirty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Division Number One, wherein Johanna Nelson is the plaintiff in error and you, W. W. Casey, Henry Shattuck and Allan Shattuck, are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 14th day of May, A. D. 1921, and of the Independence of the United States the 145th.

ROBERT W. JENNINGS,  
District Judge.

Due and personal service of the foregoing citation is hereby admitted, this 13th day of May, A. D. 1921.

H. L. FAULKNER,  
Attorney for Defendants in error.



Filed in the District Court, District of Alaska,  
First Division. May 14, 1921. J. W. Bell, Clerk.  
By L. E. Spray, Deputy. [32]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 1977-A.

JOHANNA NELSON,

Plaintiff,

vs.

W. W. CASEY, HENRY SHATTUCK, and AL-  
LAN SHATTUCK,

Defendants.

**Praeipice for Transcript of Record.**

To Jay W. Bell, Clerk of the District Court, Division Number One, Territory of Alaska:

Kindly certify to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the following records of your office in the above-entitled case:

1. Complaint.
2. Demurrer to complaint.
3. Order sustaining demurrer to complaint.
4. Opinion of court on demurrer.
5. Amended complaint.
6. Demurrer to amended complaint.
7. Order sustaining demurrer to amended complaint.
8. Judgment.

9. Assignment of errors.
10. Order granting writ of error.
11. Writ of error.
12. Bond on appeal.
13. Original citation.
14. This praecipe.

RODEN & DAWES,  
Attorneys for Plaintiff.

Filed in the District Court, District of Alaska,  
First Division. May 20, 1921. J. W. Bell, Clerk.  
By L. E. Spray, Deputy. [33]

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In the District Court for the District of Alaska,  
Division No. 1, at Juneau.

**Certificate of Clerk U. S. District Court to Tran-  
script of Record.**

United States of America,  
District of Alaska, Division No. I,—ss.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached thirty-three pages of typewritten matter, numbered from one to 33, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record, prepared in accordance with the praecipe of plaintiff in error, in Cause No. 1977-A, on file in my office and made a part hereof, wherein Johanna Nelson is plaintiff and plaintiff in error and W. W. Casey, Henry Shattuck and Allen Shattuck are defendants and defendants in error.

I further certify that said record is by virtue of a writ of error and citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Fourteen and 70/100 Dollars (\$14.70) has been paid to me by attorneys for plaintiff in error.

In witness whereof I have hereunto set my hand and the seal of the above-entitled court this 23d day of May, 1921.

[Seal]

J. W. BELL,  
Clerk.

By L. E. Spray,  
Deputy.

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[Endorsed]: No. 3698. United States Circuit Court of Appeals for the Ninth Circuit. Johanna Nelson, Plaintiff in Error, vs. W. W. Casey, Henry Shattuck and Allen Shattuck, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed June 9, 1921.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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JOHANNA NELSON,

Plaintiff in Error,

vs.

W. W. CASEY, HENRY SHATTUCK and ALLEN  
SHATTUCK,

Defendants in Error.

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**Brief of Plaintiff in Error**

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UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE  
DISTRICT OF ALASKA,  
DIVISION NO. 1.

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RODEN & DAWES,  
Attorneys for Plaintiff in Error.

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No. 3698

United States  
Circuit Court of Appeals  
For the Ninth Circuit

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JOHANNA NELSON,

Plaintiff in Error,

vs.

W. W. CASEY, HENRY SHATTUCK and ALLEN  
SHATTUCK,

Defendants in Error.

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Brief of Plaintiff in Error

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UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE  
DISTRICT OF ALASKA,  
DIVISION NO. 1.

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RODEN & DAWES,  
Attorneys for Plaintiff in Error.



## STATEMENT OF THE CASE

This is an action for damages for the destruction of real and personal property caused by a freshet in a creek known as "Gold Creek" in the City of Juneau, Alaska. A general demurrer to the complaint was sustained and plaintiff brings the case before this court on a writ of error.

The complaint alleges that defendants were the owners of a certain tract of land comprising the delta of Gold Creek; that for the purpose of making this delta attractive for residence purposes and thereby render it marketable, defendants undertook to and did turn the channel of Gold Creek by erecting bulkheads across the old channel and thereby diverting the water in direction of plaintiff's lots. (pp. 17, 21 and 22).

And to protect the left or east bank of the creek, where the plaintiff's property was situated, defendants undertook to and did erect a bulkhead for a distance of several hundred feet. But this bulkhead was so weak and constructed so unskillfully that it could not withstand the force of the water diverted against it by the bulkhead erected on the other side of the new channel and across the old channel. (p. 18).

It is further alleged that plaintiff was ignorant of the fact that the creek was subject to freshets, ignorant of the fact that the channel had been changed, ignorant of the fact that the bulkhead on her side of the creek was so weak that it would not withstand the water or that it was likely to be washed

away. (pp. 18 and 19).

A general demurrer to the original complaint was sustained because it was not alleged that defendants, though they changed the channel of the creek and constructed the bulkheads, yet did not undertake to "actively maintain" the bulkheads after their construction, and there was nothing to show that they had not abandoned the premises after the bulkheads had been constructed.

The amended complaint does not aver the defendants "actively maintained" the bulkheads, for this could not have been proven; but it does allege that defendants constructed them for the purpose of permanently reclaiming the land in question and protecting the banks; that the bulkheads were there and continued to be there for the purpose for which they were originally constructed, and facts are alleged from which it must be concluded that it was the duty of defendants to maintain and keep in repair the bulkheads in question, and that it was their duty not to erect them in the first place unless they did so carefully and skillfully, and in such manner that they would be permanent. (pp. 21 and 23)

The allegations in the amended complaint which it is claimed show that it was the duty of defendants to *continue* to restrain the waters of the creek after they undertook to do so in the first place are, briefly, these:

Defendants owned the delta known as Casey-Shattuck Addition. To reclaim this delta the bulkhead was constructed across the old channel. The land was then platted into streets, blocks and lots; the streets were improved by the public; lots were placed on the market and sold and valuable houses

erected by the purchasers. If the bulkheads across the old channel had been permitted to break, large areas of the land so sold and improved would have been destroyed. Defendants continued to offer lots for sale which would have been submerged had the bulkheads been destroyed or removed. These facts are such as to estop defendants from asserting that they did not maintain the dams or bulkheads, and are such as to estop defendants from asserting that not only to use care in constructing but also in maintaining such bulkheads.

The question before the court is whether or not the facts alleged in the amended complaint are sufficient to entitle plaintiff to recover.

The ruling complained of is the court's order sustaining defendants' general demurrer to the amended complaint.

The claim of right to recover is based upon the negligent construction of the bulkheads and upon the failure of defendants to maintain adequate bulkheads.

The facts in this case were before this court in *Eikland vs. Casey et al*, 266 Fed., 822. And the allegations in the amended complaint in the case at bar are much stronger than the complaint in the *Eikland* case.

## ARGUMENT

Defendants had the right to change the channel of Gold Creek. No one could have stopped them doing so.

But when they did change the channel it was incumbent upon them to do the work in such a manner



that no one would thereby be injured.

It was incumbent upon them to make the new channel as large and capacious as the old channel.

*Eikland vs. Casey* 266 Fed., 822.

It was also incumbent upon defendants to use at least ordinary care and skill in making the bulkheads strong enough to withstand such action of the water as might be reasonably anticipated lest disaster should occur to the property affected by the change.

When defendants constructed the channel to reclaim and market their town lots for permanent occupancy, the public had a right to assume that the new channel was of adequate capacity and that the new banks were of adequate strength to serve the purpose for which they were apparently designed,—and that purpose was to permanently restrain the waters of Gold Creek.

When plaintiff purchased her property on the left or east bank of the new channel, she did so as a stranger in the country and without knowing that the channel was new, essentially artificial, and insufficient in capacity. Neither did she know that the bulkhead on her side of the creek was negligently constructed or that it was so weak that it would probably be washed away by any such freshet as might be reasonably expected to occur at any time.

At the time plaintiff purchased her property the defective bulkhead had been constructed. She knew none of its defects, and had a right to assume it was ample for the purpose for which it was apparently designed.

One who manufactures, or sells, or delivers an article which he knows to be dangerous to life and limb without giving notice of its dangerous quali-

ties or conditions, is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there was any contractual relationship between the parties or not:

Thompson on Negligence, Sections 817—821;

Ward vs. Pullman Co., 128 SW., 606;

Walcho vs. Rosenbluth 71 Atl., 566;

Hasbrouck vs. Armour 121 NW., 157;

Waters-Pierce Co., vs. Deselms, 212 U. S., 159;

Standard Oil Co., vs. Parish, 145 Fed., 829;

Wyman vs. Boston B. Co., 175 Fed., 834.

When defendants dammed up the old channel and forced the current of the water against the other bank where plaintiff's property was located, they committed an unlawful act unless they erected bulkheads sufficient to protect that other bank from such current so turned. If the defendants themselves owned the land on the left or east bank at the time the channel was changed and afterwards sold the land on that side of the new channel, the purchaser had a right to assume that the bulkhead was constructed with care and skill and that it was adequate for the purpose for which it was apparently contrived.

One who places on the market and sells land artificially reclaimed and protected against water by artificial structures, guarantees that those structures are designed and constructed with skill and care and are suitable for the purpose for which they are apparently erected.

The person who constructs bulkheads for the purpose of protecting land against freshets or floods, though he be only a contractor and not the owner of the land, becomes liable to one who is injured by the negligence of the contractor, if the injury was such

as would naturally be expected to result from the character of the negligence.

But it is contended that there is nothing to show that defendants did not abandon the bulkheads as soon as they were built, and it is contended that if they did abandon the bulkheads immediately after their construction, defendants cannot be held liable after such abandonment. This is the point on which the lower court decided the case. The lower court said:

“For aught that appears in the complaint, the defendants may in the year 1914 have changed the course of the creek for purposes of their own, and those purposes may have been accomplished and the defendants have lost all interest in the creek or any property adjacent thereto or to be benefited thereby. Surely they would not be liable forever afterwards because on a certain day they changed the course of the creek. It seems to me that they would be liable only during such time as they were maintaining the obstructions complained of.” (p. 12)

There are allegations to the effect that the defects which caused the injury were defects of the original construction. There are also allegations to the effect that the defendants did not abandon the premises, but continued to offer for sale lots dependent for their value upon the effectiveness of the bulkheads.

But assume, for the sake of the argument, that defendants had, shortly after the completion of the new channel, sold all their holdings in Juneau and left the country, would that have relieved them from the natural effects of their own negligence in con-

structing the new channel? Certainly not. They could not relieve themselves from the effects of the wrong without righting the wrong before injury occurred.

5 Thompson on Negligence, Section 6163;

Fritz vs. Watertown, 111 NW, 630;

Schuenke vs. Town of Pine Ridge, 54 NW, 1007;

Bills vs. Town of Kaukauna, 68 NW, 992.

Suppose a person erected a large office building so negligently constructed that in event of an ordinary wind storm or ordinary earthquake shock it would collapse; suppose he sold the building and then left the country; suppose thereafter from the effects of an ordinary wind storm or ordinary earthquake shock the building collapsed as a result of its negligent construction, and that, in consequence, tenants in the building and passersby on the street in front of it were killed, would the party whose negligence was primarily responsible for the catastrophe be relieved from liability because he no longer maintained the building or because he had "ceased to be interested" in it? Certainly not. The party guilty of the wrong which caused the injury is responsible for the damage sustained,—if the injury was the natural result of the negligence or wrong.

Suppose in this case defendants, instead of constructing a channel on the surface, had constructed an underground tunnel to convey the waters of Gold Creek. If such tunnel through inadequate or negligent construction had broken and other people's homes had been washed away, would not defendants have been responsible for the result of their own wrong? And it would have made no difference whether the homes destroyed had been purchased be-



fore or after the tunnel was constructed; nor whether such homes had been purchased from defendants or others. The only question would be whether or not defendants' negligence was the proximate cause of the injury.

In the case at bar it is alleged that plaintiff knew nothing about the change in the channel, the inadequacy of the new channel or the defects in the bulkheads; nor did she know the susceptibility of Gold Creek to freshets, and had no conception of the danger to which she subjected herself when she purchased her property.

But it is averred very clearly that the negligence complained of was the proximate cause of the destruction of plaintiff's home. What more is needed?

It may be true that the new channel was a trap set to catch others and not plaintiff. But the trap was set. Plaintiff did not know it was a trap and did not know it might be sprung at any time. She bought her home not knowing that the new channel was a device which through the negligence of defendants, endangered her property and her life.

If defendants unbeknown to plaintiff had left a powder magazine near her home and under such condition that it was likely to explode at any time, it would make no difference whether she purchased her land from defendants or from somebody else; whether or not she purchased it before or after the magazine was established; nor would it make any difference whether defendants had departed from the property and left the dangerous magazine to fare as it might, or whether they still continued to actively maintain it.

Thompson on Negligence, Secs. 968—981, 1055—



1074.

Addison on Torts, Secs. 227—232.

This is not an action for breach of contract. It is an action in tort based upon a misfeasance.

It is elementary that every person must abstain from such acts as are in their nature dangerous to others. To set a bear trap and then walk away and leave it under such conditions that others are likely to step into it, is an actionable wrong.

Hooker vs. Miller, 37 Ia., 613;

Grant vs. Hass, 75 SW, 342;

Bird vs. Holbrook, 4 Bing., 628;

Jones vs. Nichols, 46 Ark., 207.

Let us see if the allegations in the amended complaint are sufficient to bring the case within the principles announced. In paragraph four it is alleged:

“That the embankment so erected by defendants on the easterly side of said new channel and at the point where said new channel runs adjacent to plaintiff’s lot and for several hundred feet northerly therefrom, were unskillfully and negligently constructed too weak and inadequate to withstand the force of the water which might and would come down said channel during freshets or during such periods of heavy down-pour of rain on the watershed of the said stream as from time to time naturally and generally occurred and might naturally be expected to occur in the future. That by reason of said facts plaintiff’s property aforesaid was by defendants’ said wrongful acts exposed to danger of being washed away by the waters thrown or forced against said property by reason of the

various embankments or bulkheads erected by defendants across and in the old channel of said stream to prevent said stream from spreading in the manner it did before said obstructions, embankments or bulkheads were erected as above described." (p. 18)

In paragraph five, after it is alleged that plaintiff was ignorant of the change in the channel or of the character of Gold Creek, it is further stated:

"That plaintiff was at all times herein mentioned ignorant of the weak and inadequate condition of the said artificial embankment adjacent to her said lots and to the northerly therefrom, and of the negligent condition in which the same had been constructed and maintained, and knew nothing of the danger to which she, her family and property were subjected by reason of defendants' said negligent and wrongful acts above described."

In paragraph six it is alleged that the defendants were familiar with the character of Gold Creek and the freshets that habitually visited the section, and understood fully the weak condition of the bulkheads and knew their inadequacy. It is then alleged:

"That by reason of said facts above set out, plaintiff's said property was at all times exposed to the danger of being washed away by freshets in said stream and plaintiff alleges that defendants were grossly negligent in this that they failed to construct and maintain on the easterly side of said stream adjacent to plaintiff's said property and for several hundred feet northerly therefrom, a bulkhead or

embankment adequate to protect plaintiff's said property against any water that would be forced against said bulkhead or embankment by the said change in the course of said stream or by the erection or maintenance of a bulkhead, embankment or obstructions in and across the old channel or said stream, preventing said stream as aforesaid from spreading in a westerly direction in event of freshets, in the same manner that said stream was wont to do before the said change in the course of said stream was caused by defendants as aforesaid." (p. 20)

The seventh paragraph of the amended complaint sets out in detail the facts from which the following conclusion is alleged:

"That by reason of said facts above set out, it was the duty of defendants to at all times keep and maintain said bulkheads or embankments in good condition or repair and in every way edaquate to keep and restrain the waters of said stream within the said new channel and prevent said waters from flowing on or in any manner injuring the said adjoining premises." (p. 22)

Paragraph eight of the amended complaint describes the manner in which the injury occurred to-wit:

"The waters in said stream were prevented from spreading freely in a southwesterly direction and were forced up against the said artificial and inadequate embankments adjacent to plaintiff's said lots and northerly therefrom, which embankments by reason of said weakness and inadequacy, gave way under the force of said waters which latter then and there nec-

essarily by reason of defendants' said wrongful acts above described, washed away both of plaintiff's said houses above described, and destroyed all the improvements on said lots, etc." (p. 23)

On the question of negligence it is difficult to discern the difference in principle between the case at bar and those cases where a dam is constructed in the creek for storing water for industrial purposes.

If a dam be erected in the channel of a water course and it gives way through faulty and negligent construction, the party who is guilty of the negligence which caused the injury must pay the damages naturally resulting and of which the negligence was the proximate cause. And it would make no difference whether the property destroyed originally was owned by the defendant and was sold by him after the dam was constructed, or whether it was owned by persons in no manner in privity with defendant.

The actionable wrong consists in negligently exposing others to danger.

Nor could the delinquent party relieve himself from the consequences of his own delinquency by abandoning the dam while the dam, due to its faulty construction, remained a menace to the property below.

Eikland vs. Casey, 266 Fed., 822;

City Water Power Co. vs. Fergus Falls, 128 NW, 817;

Arave vs. Idaho Canal Co., 46 Pac., 1024;

Free vs. Parr Schoals Power Co., 97 SE, 243;

Beauchamp vs. Taylor, 111 SW, 609.

In the case of Arave vs. Idaho Canal Company, the court had occasion to consider the rights of those



who acquired property jeopardized by artificial canals subsequent to the construction of the canal. The court said:

“Appellants’ claim that the corporation defendant is not called upon to consider or respect the rights of settlers along the line of its canal, who have made such settlement subsequent to the location of the canal, *is not only unsupported by law, but is repugnant to every principle of equity and good conscience.*”

The same, in substance, was held in the last two cases above cited.

In support of the general proposition of absolute liability announced by this court in the Eikland case, we submit the following authorities:

Wiltse vs. Red Wing, 109 N. W., 114;

Pexley vs. Clark, 35 N. Y., 520;

Cahil vs. Eastman, 18 Minn., 24;

Brennan vs. Cumberland, 15 L. R. A. (N. S.), 535 and notes;

Hauck vs. Pipe Line Company, 20 L. R. A., 642;

Berger vs. Gas Light Company, 62 N. W., 336;

Water Company vs. Olinger, 32 L. R. A., 736;

Texas & Pacific vs. O’Mahoney, 60 S. W., 902;

Mercantile Company vs. Thurmond, 33 L. R. A. (N. S.), 1061 and notes.

Essen vs. Wattier, 34 Pac., 756;

Mallett vs. Taylor, 152 Pac., 873.

The last case cited expressly states that the doctrine of Rylands vs. Fletcher has been adopted by Oregon.

Respectfully submitted,  
 RODEN & DAWES,  
 Attorney for Plaintiff in Error.





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IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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JOHANNA NELSON,  
*Plaintiff in Error,*

—vs—

W. W. CASEY, HENRY SHAT-  
TUCK, and ALLEN SHATTUCK,  
*Defendants in Error.*

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No. 3698

ERROR TO THE DISTRICT COURT FOR THE  
TERRITORY OF ALASKA,  
FIRST DIVISION

---

**Brief of Defendants in Error**

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H. L. FAULKNER,  
Juneau, Alaska.

LYONS & ORTON,  
Seattle, Washington.  
*Attorneys for Defendants in Error.*

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*Defendants in Error.*

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No. 3698

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**Brief of Defendants in Error**

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**STATEMENT OF THE CASE**

The defendants in error are preparing their brief without having before them a copy of the brief of plaintiff in error. It therefore becomes necessary for defendants in error to state in substance the facts disclosed by the record.

The following is a substantial recital of the material allegations of the amended complaint.



Plaintiff is and ever since the 4th day of October, 1915, has been the owner of Lots Nine (9) and Ten (10) in Block Two Hundred and thirteen (213) of the Casey-Shattuck Addition to the City of Juneau. That prior to September 26, 1918, said lots were the place of residence and abode of plaintiff and her family; that the plaintiff had on said lot prior to the date last mentioned two houses built for use as residences and the ground about which and upon said lots were beautified by gardens and improved by the planting of berry bushes and the erection and maintenance of other out houses and fences.

That Gold Creek is a mountain stream, both sides of which are formed by very steep mountains rising to an elevation of some 3000 feet above the creek bed, by reason of which fact heavy rains would and actually did cause in said creek periodically sudden freshets of great magnitude and violence; that that part of the City of Juneau known as Casey-Shattuck Addition consisting principally of a delta of low ground formed by said Gold Creek and sloping toward the southwest and over which

said Gold Creek flowed after it emerged from the narrow gorge immediately to the north of said Casey-Shattuck Addition; that during the year 1914 the defendants, for their own use and benefit, and for the purpose of reclaiming from the waters of Gold Creek certain tracts of land on the said delta and in the said Casey-Shattuck Addition, and for the purpose of making said land suitable and marketable for residence purposes, changed the course of said stream below said gorge and where it flows over said delta from a southwesterly to a southerly direction and to a position where it was by said change caused to flow adjacent to the lots of plaintiff, and that defendants for the said purpose confined the course of said stream to a channel too narrow and too shallow to accommodate and safely convey all the waters which might and did flow through said stream during the period of great precipitation of rain and great freshets. That for the purpose of changing and confining the channel of said stream defendants erected bulkheads in and across the old channel of said stream so as to divert the waters away from the old channel and force the waters of said stream to flow in a new channel and in a southerly direction adjacent to plaintiff's

lots; that defendants erected upon both sides of the new channel bulkheads or embankments; that such embankments on the easterly side of said new channel and at a point where the same runs adjacent to plaintiff's lots and for several hundred feet northerly therefrom, were unskillfully and negligently constructed and were too weak and inadequate to withstand the force of the water which might and would likely come down said channel during said freshets and during said period of heavy downpour of rain on the watershed of said stream as from time to time *naturally* and *generally* occurred and might naturally be expected to occur in the future. That at the time plaintiff became the owner of said lots and ever after she was ignorant of the change of the course of said stream and was ignorant of the fact that prior to the erection of said dam by defendants the general course of said Gold Creek was at other and different places and that during the freshets the said stream naturally spread over a large area and flowed through several channels; that plaintiff was also at all times ignorant of the weak and inadequate condition of the artificial embankments constructed by defendants adjacent to her said lots and northerly

therefrom; that defendants knew or should have known that Gold Creek was a violent stream having violent freshets from time to time; knew that the inevitable effect of the bulkheads erected by defendants across the old channel and on the westerly side of said stream was to obstruct the natural course and tendency of the waters of said stream, and that said bulkheads did divert and force the waters of said stream with great violence against plaintiff's property; that the new channel constructed by the defendant was too small to safely convey the waters of the stream during periodical freshets; that the bulkhead on the easterly side of the new channel adjacent to plaintiff's property and for several hundred feet northerly therefrom was too weak, flimsy and inadequate to withstand the force of the water which would *naturally* be thrown against it in case of freshets, after the bulkheads or the embankment in the old channel and on the westerly side of the new channel were erected by defendants. By reason of the defendants' acts above described plaintiff's property was at all times exposed to the danger of being swept away by said freshets in said stream. That prior to, at and after the turning of the channel and the erection of said



bulkheads, defendants surveyed and platted the lands and premises on both sides of the new channel and over the former delta into building lots, streets and avenues, dedicated the said streets and avenues to public use, and offered said lots for sale to the public, defendants being then and there the owners of said premises. That at the time of the erection of said bulkheads defendants sold a large number of lots to many individuals and for a long time thereafter and until the 26th day of September, 1918, continued to offer for sale to the public the remainder of said tract. That before the 26th day of September, 1918, a large number of lots had been sold by defendants; large sums of money had been expended by purchasers in the improvement of said lots; that the City of Juneau, a municipal corporation, had at great expense constructed streets and built sidewalks upon said premises and that said streets and sidewalks were maintained by the City of Juneau up to and on the 26th day of September, 1918, at great expense. That on the 26th day of September, 1918, while plaintiff was the owner of the property above described a downpour of rain occurred which caused a freshet in Gold Creek and by reason of the acts of defendants above stated,



the waters in Gold Creek were prevented from spreading freely in a southwesterly direction and were forced up against the artificial and inadequate bulkhead erected by defendants and adjacent to plaintiff's lots and northerly therefrom. That by reason of the weakness and inadequacy of said embankments and bulkheads they gave way under the force of the water and that the residence of plaintiff, together with considerable of her furniture, were washed away and destroyed and that she suffered damaged in the sum of \$9000.00. (Tr. 15 to 24 inclusive.)

To the amended complaint the defendants in error interposed a demurrer alleging that the complaint does not state facts sufficient to constitute a cause of action against the defendants, or either of them (Tr. 25). The Court sustained the demurrer (Tr. 26). The plaintiff elected to stand on her amended complaint and the Court thereupon entered judgment dismissing the action. (Tr. 27-28.)

We submit the judgment of the trial court should be affirmed for the following reasons:

1. The amended complaint alleges that the plaintiff, on the 4th day of October, 1915, acquired

the real estate which she alleges was damaged by the force of the waters of Gold Creek escaping after the breaking of the dam (Tr. 15) ; and that the dam and bulkheads were built and the waters of Gold Creek diverted by defendants into a new channel in 1914 (Tr. 17).

2. The amended complaint fails to allege that defendants, or any of them, were the owners of or in possession of the dam or bulkheads or the ground on which the same are situate on the 26th day of September, 1918, when it is alleged plaintiff's property was damaged by escaping waters occasioned by the alleged breaking of the dam and bulkheads. The reasonable and natural inference from the facts stated in the amended complaint is, that the dam and bulkheads were, at that time, in the possession of and under the control of the City of Juneau, a municipal corporation.

3. The amended complaint does not allege that defendants, or any of them, maintained the dam, bulkheads or new channel after the construction thereof, nor does it allege any facts warranting the inference that defendants were obligated to plaintiff, or any one else, to maintain the same.

Referring to the first reason assigned why the judgment of the trial court should be sustained, we contend that since the plaintiff purchased her property, alleged to have been destroyed, after the building of the dam and bulkheads and the diversion of Gold Creek, she purchased the same fully realizing the character of Gold Creek and the character of the dam and bulkheads which would be necessary to withstand its freshets during certain seasons of the year, for the amended complaint does not allege that the plaintiff was not equally as familiar with the history of that stream and its freshets as were the defendants. It is true the amended complaint alleges that the plaintiff, at the time she purchased the property, was ignorant of the changes that had been made in the channel by the defendants and was ignorant of the inadequate character of the dam and bulkheads to withstand the pressure of the waters of Gold Creek during certain periods of the year, but it would seem that it was her duty to ascertain whether or not the dam and bulkheads were sufficient to withstand the force of the waters of Gold Creek during the freshets before she purchased the property. A different rule would obtain if she alleged any facts

from which it could be reasonably inferred that the defendants were obligated to maintain the dam for a period of time extending beyond the date of the breaking of the dam. Plaintiff knew when she purchased the property that the dam and bulkheads were permanent structures, and she bought the property burdened with whatever danger and menace might be caused by the insecure character of the dam and bulkheads. In her amended complaint she says: "That by reason of these facts the plaintiff's property aforesaid was by defendants' said wrongful acts, exposed to the danger of being washed away by the water thrown or forced against said property by reason of the various embankments or bulkheads erected by defendants across and in the old channel of said stream to prevent said stream from spreading in the manner it did before said obstructions, embankments or bulkheads were erected as above described." (Tr. 18.)

"The evidence shows that the improvement on the dam is of a permanent nature, and was completed a year or more before appellant became the owner of the land to which the injury is alleged to have been caused by the overflow. Any damage that resulted to it, therefore, by reason of this increased height of the dam



was caused while the title thereto remained in her brother-in-law, and any cause of action on account thereof was in him, and his failure to assert such right as he may have had does not have the effect of transferring to his vendee, the appellant, the right to sue therefor. The injury had been sustained when she purchased. She took the land in its injured or damaged condition and it must be presumed that the damage to the farm by reason of the overflow was taken into consideration and accounted for to her in fixing the price which she was required to pay. *City of Richmond vs. Gentry*, 136 Ky. 319; 124 S. W. 337; 136 Am. St. Rep. 255; *Louisville & Nashville R. R. Co. vs. Lambert* 110 S. W. 305; 33 Ky. Law Rep. 199; *Stickley vs. Chesapeake & O. R. R. Co.* 93 Ky., 323; 20 S. W. 261; 14 Ky. Law Rep. 417''; *Pence vs. City of Danville*, 145 S. W. 385 at 386.

In *Beauchamp vs. Taylor*, 111 S. W. 609 at 611, the court said:

“Defendants demurred to the evidence, and here insist that the demurrer should have been given. Their contention is, that the plaintiff purchased the land with knowledge that defendants had constructed and were maintaining the levee, and therefore purchased it burdened with the levee. If the levee was not a lawful structure—that is, if it obstructed the flow of water in a natural channel—it was a nuisance, and while plaintiff cannot sue and recover for the erection of the nuisance, he is clearly entitled to recover any damage he may have sustained by reason of its maintenance.”

*City of Richmond vs. Gentry*, 124 S. W. 337, at 338-339.



In *Louisville and N. R. Co. vs. Lambert*, 110 S. W. 315, at 307 the court said: "But appellant vigorously contends that as appellee sold two of the lots before the wall was completed, he had no cause of action as to them against appellant; and that the purchaser alone, who owned the lots at the time of the completion of the wall, had the right to sue. It is well settled in this state that the party owning the lots at the time the damage was done has the right to sue. This right is not affected by his subsequent parting with the title. *Stickley vs. Chesapeake & O. Ry. Co.*, 93 Ky. 323; 20 S. W. 261. In this case, if the property in question was damaged by the construction of the wall, some one had the right of action. If the purchaser of the property had brought suit to recover, the conclusive answer would have been that the property had been permanently damaged in its market value,—if damaged at all,—at the time of the purchase. He bought the property at a reduced price. He was not damaged, because he got the advantage of the reduction in the price."

It may be insisted that the following cases, *Chesapeake & O. Ry. Co. vs. Robbins*, 157 S. W. 903, and *Sherout vs. Chesapeake & O. Ry. Co.*, 162 S. W. 97, both Kentucky cases, do not sustain the view herein contended for, but it will be observed in both of those cases that it was alleged and proved that the plaintiffs could not, by reasonable diligence, have ascertained that the structures complained of,

in any way depreciated the vendible value of the property or caused the overflowing of the same. In *Chesapeake & O. Ry. Co. vs. Robbins, supra*, the court in its opinion said:

“Appellee, by an amended petition, alleged, in substance, that, at the time of the construction of the bridges, abutments, piers and embankments by appellant, it was not apparent to her, or to any person of ordinary prudence residing in Salt Lick, that same would obstruct or divert the waters of the creeks and that this did not become apparent until the flood of 1909, nor could she before that time, by the exercise of the highest degree of care, have ascertained that the abutments, piers and embankments would obstruct or divert the waters of the creeks or cause them to overflow her premises.”

There is a similar allegation in the petition of *Sherout vs. Chesapeake & O. Ry. Co., supra*. A careful analysis of those two cases will disclose the fact that the courts proceeded on the theory that the pleadings and proofs showed that the plaintiffs when they purchased their property could not have anticipated the menace or danger to the same caused by the building of the piers and structures, which thereafter produced the overflow, occasioning the damages complained of.

Plaintiff in her amended complaint does not allege that she was not familiar with the danger to

her property occasioned by the building of the dam and bulkheads, nor does she allege that she was not equally as familiar as the defendants with the history of Gold Creek freshets and the necessary strength of dams and bulkheads to withstand the force of the waters of that stream during such freshets. She could easily have ascertained from any one accustomed to estimating the strength of dams, whether or not the dam and bulkheads constructed by defendants would withstand the force of the waters occasioned by any freshet in Gold Creek which could reasonably have been anticipated by the defendants.

“But the rule as to the class of cases is subject to an important modification where the injury complained of is permanent. In such cases the rule is altered for the sake of convenience, and but one action is allowed. The plaintiff is required to recover in one suit the entire damages, present and prospective, caused by the defendant’s act. Injuries caused by permanent structures infringing upon the plaintiff’s rights in his land, such as railroad embankments, culverts, and bridges, permanent dams and permanent pollutions of water, fall in this class. Gould on Waters, Third Addition, page 416.”

The structures complained of in the amended complaint are permanent structures. Plaintiff purchased her property subsequent to the erection of

such structures. Whatever damage to her property was occasioned by the building of such structures was done prior to the time of her purchase. She therefore could not acquire a right of action against the defendants for damages done to the property prior to her purchase, as it must be assumed that the price she paid for the property was reduced by the amount of damage occasioned by the dam and bulkheads.

40 Cyc., 85-86 and 87.

We submit that the second reason assigned why the judgment of the trial court should be affirmed follows almost as a corollary from the first contention of defendants in error. The amended complaint does not allege that the defendants, or any of them, were the owners of the dam on the 26th day of September, 1918, when it is alleged plaintiff's property was damaged by the waters of Gold Creek breaking the dam. It may be that the defendants parted with their ownership of the dam long prior to that time. Plaintiff in error may contend that if it be a fact that defendants had parted with the title to the dam and bulkheads prior to the date of the alleged damage, that such fact or facts would be a matter of defense. But in order to state a cause of action against the defendants it is necessary that facts constituting



negligence be alleged. The mere building of the dam and bulkheads is not such negligence as plaintiff can complain of because she purchased her property subsequent to the erection and construction of the dam and bulkheads. If it be true that she is barred from relying on the alleged negligence in the original construction and building of the dam and bulkheads by the defendants, then in order to state a cause of action against the defendants she must allege negligence in the subsequent maintenance of the dam and bulkheads. But before she is warranted in claiming that it was the duty of the defendants to maintain the dam and bulkheads she must allege that they were either the owners of the dam and bulkheads or else controlled or were in possession of the same at the date of the alleged freshets, which she alleges broke the dam and damaged her property. The plaintiff in her amended complaint not only fails to allege that the defendants owned, claimed or were in possession of the dam and bulkheads on the 26th day of September, 1918, but she does allege that long prior to that date defendants surveyed and platted the lands and premises on both sides of the new channel, and upon and over the delta into building lots, streets and avenues, and



dedicated the streets and avenues to public use, and at great expense the City of Juneau, a municipal corporation, constructed streets and built sidewalks, and that said streets were on that date maintained at great expense by the City of Juneau (Tr. 2). After defendants dedicated the streets and avenues of the Casey-Shattuck Addition to public use and the City of Juneau, a municipal corporation, accepted such dedication, and in accordance with the same improved the streets and controlled them, it is fair to infer that the dam and bulkheads which protected that addition to the City of Juneau from Gold Creek and its freshets, were also dedicated to public use and were under the control of the City of Juneau at and prior to the time of the alleged breaking of the dam and bulkheads. We submit that such is a fair assumption in the absence of any allegation to the contrary in the amended complaint.

“The one who owns the dam at the time it gives way is the one who is *prima facie* liable for the injury done by it. The one who constructed it is not, necessarily, liable for the injury. He may relieve himself from liability by selling the structure and placing another in possession.” Third Farnham on Waters and Water Rights, s. 875-A, p. 2549.

Passing now to the third reason assigned by the defendants why the judgment of the trial court should be affirmed. The amended complaint does not allege that defendants, or any of them, maintained the dam and bulkheads or the new channel after the construction thereof, nor does it allege any facts warranting the inference that defendants were obligated to plaintiff, or any one else, to maintain the dam and bulkheads or the new channel. It is true the amended complaint does allege that it was the duty of the defendants at all times to keep and maintain the bulkheads and embankments in good condition and repair (Tr. 22), but that is merely a conclusion. No facts are alleged indicating any such legal duty or obligation. The purposes for the building of the dam and bulkheads and diversion of Gold Creek by the defendants are stated in paragraphs III and VII of the amended complaint (Tr. 17 and 20-21-22). It is obvious, therefore, that defendants would have no material interest in the dam and bulkheads after they had sold all of the lots in the Casey-Shattuck Addition. No person purchasing a lot in that addition subsequent to the erection of the dam and embankments could reasonably have expected that the defendants would continue to main-

tain the dam, bulkheads and new channel interminably. If defendants are liable to persons purchasing subsequent to the building and erection of the dam and bulkheads on account of escaping waters resulting from the breaking of the dam, then when would such liability cease? When would the statute of limitations begin to run? If the defendants had obligated themselves by contract to maintain the dam for a period of years they would be liable for any breach of such contract, but the amended complaint does not allege any such contractual relation between the plaintiff and the defendants. There is no allegation in the complaint that defendants obligated themselves to maintain the dam for any period of time. If the alleged breaking of the dam occurred twenty years after the construction of the same and the change in channel by the defendants, would the defendants still be liable for any damage sustained by the plaintiff? We submit that such a contention is obviously untenable in the absence of a showing that the defendants in some way specifically obligated themselves by contract to protect plaintiff's property from escaping waters occasioned by the breaking of the dam. If the contention of plaintiff is sound, then defendants in error would be lia-

ble to the plaintiff in error or to her successors in title for any damage that might occur at any time in the future by reason of the breaking of the dam and the consequent damage to the property of plaintiff and her successors in interest.

If “A” should construct a dam on his own premises for the purpose of appropriating a stream for irrigation or other purposes and subsequently should sell the land to “B” and a freshet should occur after the sale which should destroy the dam and a part of the real estate so sold by “A” to “B,” is “A” liable to “B” for damages sustained on account of such destruction? If so, for what period of time would such liability continue? Assume that the dam breaks by the force of the water ten years after the sale, is “A” still liable to “B” because the dam was inadequate to withstand the waters of the freshet? It is true there is no direct allegation in the amended complaint to the effect that plaintiff purchased her lots from the defendants, but the amended complaint alleges that her lots are situate in the Casey-Shattuck Addition and that defendants were the owners of the Casey-Shattuck Addition. It seems apparent that before the defendants in this case could be held liable to the plaintiff it would be



necessary for her to allege that the defendants still owned the bulkheads and new channel and that the same were being maintained by them for their own purposes at the time of the alleged breaking of the dam, or that the defendants had obligated themselves by contract to protect the property of plaintiff against the breaking of the dam and bulkheads for a period beyond the time when the alleged damage is claimed to have occurred.

As before stated, not having a copy of the brief of plaintiff in error before us, we are unable to anticipate on what authorities she will rely in this hearing, but we wish to discuss some of the cases which were cited by plaintiff in error before the trial court. That court in its opinion (Tr. 11-12-13-14) clearly differentiates between the facts in three of the cases cited by plaintiff in error, and the facts in the case at bar. We deem it unnecessary to devote further consideration to those cases.

In the argument before the trial court plaintiff in error also relied on *Wilson vs. Boise City*, 55 Pac. 887. The ruling in that case might be successfully invoked by plaintiff in error if the City of Juneau were the defendant in this action. As the court



said in its opinion in that case, "It was the duty of the defendant to protect all the property along the line of said artificial channel, not only for the benefit of persons who owned such property at the time of the construction of such artificial channel, but also for the benefit of their successors in interest." That is, there was a continued obligation on the part of the city to protect the lives and property of its inhabitants against the breaking of the artificial canal constructed and maintained by the city. But the reason for the ruling of the court in that case does not exist in the case at bar. The City of Boise, in that case, not only constructed the artificial channel which was inadequate to convey the waters of the stream during freshets, but continued to maintain such artificial channel in its inadequate condition, and the liability of the city resulted from its failure to maintain a channel which would safely convey the waters of the stream during all seasons of the year and thereby safeguard the property of the inhabitants of the city.

It will be observed that in the statement of facts in *Wilson vs. Boise City*, 55 Pac. 887, *supra*, the following appears in the stipulation:

“That ever since the construction of said flume the same has been used for the purpose of carrying the waters of said Cottonwood Creek where the same leaves said mountains to Boise River, and that the same has been cared for and maintained by the Mayor and Common Council.”

There are no facts alleged in the amended complaint from which it can be inferred that the defendants were obligated to maintain and keep in repair the dam, bulkheads and new channel.

Plaintiff in error also relied before the trial court on *Wilson vs. Boise City*, 117 Pac. 115, which was a later case decided on by the Supreme Court of the State of Idaho, involving the inadequacy of the flume which had been held to be inadequate to convey the waters of Cottonwood Creek, in *re Wilson vs. Boise City*, 55 Pac. 887, *supra*. The court in the last *Wilson* case held the City of Boise was liable to the plaintiff because it had undertaken to and did divert the waters of Cottonwood Creek from their natural channel and undertook to, and did attempt to maintain a new channel for such waters. The court held that the City of Boise having once diverted the waters of the creek from their natural channel, obligated itself to protect the inhabitants

of the city against damages sustained on account of the inadequacy of such new channel to convey the waters of the creek during a freshet.

Plaintiff in error also cited at the trial *Sherout vs. Chesapeake & O. Ry. Co.*, 162 S. W. 97. In that case the defendant claimed it was not liable to the plaintiff because the latter had purchased his land after defendant had erected its concrete abutments and piers to support its railroad bridges. In passing upon the controversy the court said, among other things: "This view of the matter ignores the fact that the obstruction of the two streams by the abutments, piers and bridge approaches, continued after appellant's acquisition of title to the property." That is, the railway company continued to use and maintain its piers and bridge approaches, and the maintenance of the same produced the damages complained of by the plaintiff. In the case at bar there are no facts alleged to justify the deduction that defendants in error were at the time of the alleged breaking of the dam maintaining or using, or attempting to maintain or use, the same. In fact, the reasonable inference from all of the allegations in the amended complaint is that the City of Juneau

was maintaining or at least should have been maintaining the dam, bulkheads and new channel prior to and at the time of the alleged breaking of the dam and bulkheads, because long prior to that time the Casey-Shattuck Addition had become a part of the City of Juneau. Its avenues and streets had been theretofore dedicated to the city by the defendants in error, and the City of Juneau had assumed jurisdiction and control of the same. Manifestly the rulings in all of the cases cited by plaintiff in error at the trial are inapplicable to the facts alleged in the amended complaint, for in all such cases the defendants were obligated to maintain such bulkheads, dams, canals or channels as would be sufficient to protect the plaintiffs' property from any increase in the volume of water in the streams in question, which reasonably could have been anticipated, and in each case so cited by the plaintiff in error the defendant or defendants were actually maintaining the structures which caused the damage complained of by the plaintiff.

We respectfully submit that the amended complaint does not state facts sufficient to constitute a

cause of action against the defendants in error, and, therefore, the judgment of the trial court should be affirmed.

H. L. FAULKNER,  
Juneau, Alaska.

LYONS & ORTON,  
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*Attorneys for Defendants in Error.*





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IN THE <sup>13</sup>

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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JOHANNA NELSON,  
*Plaintiff in Error,*

—vs—

W. W. CASEY, HENRY SHAT-  
TUCK, and ALLEN SHATTUCK,  
*Defendants in Error.*

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No. 3698

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SUPPLEMENTAL BRIEF OF DEFENDANTS  
IN ERROR

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Filed

SEP 16 1911

J. D. Mendenhall



IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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JOHANNA NELSON,  
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W. W. CASEY, HENRY SHAT-  
TUCK, and ALLEN SHATTUCK,  
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---

No. 3698

SUPPLEMENTAL BRIEF OF DEFENDANTS  
IN ERROR

Defendants in error have received a copy of the brief of plaintiff in error since they prepared their original brief herein, and now desire to supplement their former brief by calling the court's attention to certain inaccurate statements of fact, and erroneous application of law contained in the brief of plaintiff in error.

On page 1 the following recital appears:

“It is further alleged that plaintiff was ignorant of the fact that the creek was subject to freshets, ignorant of the fact that the channel had been changed, ignorant of the fact that the bulkhead on her side of the creek was so weak that it would not withstand the water or that it was likely to be washed away” (pp. 18 and 19)”—

but the amended complaint does not allege that plaintiff was ignorant of the fact that Gold Creek was subject to freshets.

On page 6 of her brief plaintiff in error states:

“When plaintiff purchased her property on the left or east bank of the new channel, she did so as a stranger in the country and without knowing that the channel was new, essentially artificial, and insufficient in capacity, etc.”

The amended complaint does not allege that when plaintiff in error purchased her property she did so as a stranger in the country, nor does it allege that she did so without knowing the insufficiency of the new channel to convey the waters of the creek.

On page 10 of her brief plaintiff in error says:

“In the case at bar it is alleged that plaintiff knew nothing about the change in the channel, the inadequacy of the new channel or the



defects in the bulkheads; nor did she know the susceptibility of Gold Creek to freshets, and had no conception of the danger to which she subjected herself when she purchased her property.”

The amended complaint does not allege that plaintiff in error knew nothing of the inadequacy of the new channel, nor does it allege that she knew nothing of the susceptibility of Gold Creek to freshets.

In the absence of any allegation to the contrary, it must be assumed that plaintiff in error was equally as familiar with the periodical freshets of Gold Creek as were the defendants.

All the cases cited on page 7 of the brief of plaintiff in error deal with instances where the defendants sold articles which they knew to be dangerous to human life unless carefully handled, and were held liable to third parties for injuries sustained on account of defendants' negligence in failing to properly indicate the dangerous character of the packages containing such articles. But such cases have no application to the facts in the case at bar, as the authorities cited later in this brief will conclusively show.

The facts in the cases cited on page 9 of the brief of plaintiff in error bear no analogy to the facts in this case. In each of those cases the defendants were in control and possession of the defective streets and structures at the time such defects occasioned the damages complained of.

The cases cited on pages 14 and 15 in the brief of plaintiff in error are not applicable here, for in each of those cases the plaintiff had purchased his property prior to the construction of the dam, flume or canal, the defects of which caused the danger complained of, or such dam, flume or canal was maintained by the defendants at the time of the damage occasioned by the alleged defects of such dam, flume or canal.

Plaintiff in error cites *Eikland vs. Casey*, 266 Fed. 821, a case recently decided by this court. We submit the conclusion reached by the court in that case can have no controlling effect here, for in that case the plaintiffs purchased the land and built the house thereon prior to the building of the dam. In a recital of the facts in the last case cited this court said:

“After the plaintiffs had built a house and improved their property, defendants built a

dam or bulkhead across the creek at a point approximately opposite the plaintiffs' lot, and from the dam, and from a point opposite and across the stream, constructed bulkheads of logs and stone to Gastineau Channel at a point to the southeast, thus changing the course of the stream and deflecting it to the southeast in a curve around the west and south sides of plaintiffs' lots."

In the case at bar the plaintiff in error purchased her property long subsequent to the construction of the dam and bulkheads.

The amended complaint shows no contractual relations existing between plaintiff and defendant in error. In the absence of such relationship there can be no liability for alleged damage caused by mere acts of negligence.

"The rule is that an action for negligence will not lie unless the defendant was under some duty to the injured party at the time and place where the injury occurred, which he has omitted to perform." *Daugherty vs. Herzog* (145 Ind. 255), 32 L. R. A. 837.

"The true rule, which we think applicable to it, may be found in *Wharton on Negligence*, Sec. 439. It is as follows: 'There must be causal connection between the negligence and the hurt, and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency.

Thus, a contractor is employed by a city to build a bridge in a workmanlike manner, and after he has finished his work, and it has been accepted by the city, a traveler is hurt while passing over it by a defect caused by the contractor's negligence. Now, the contractor may be liable upon his contract to the city for his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain such a conclusion is that otherwise there would be no end to suits. But a better ground is that there is no causal connection between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence on the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence in the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an independent, responsible agent, breaking the causal connection."

"A contractor after the completion and delivery of possession of a building and its acceptance by the owner is not liable to a stranger to the contract for injuries resulting from defects in the construction of the building." *Curtain vs. Somerset* (140 Pa. 70), 12 L. R. A. 322.

*Heizer vs. Kingsland & Douglass Mfg. Co.*, (110 Mo. 605), 15 L. R. A. 821.

*McCaffrey vs. Mossberg & Granville Manufacturing Company* (50 Atl. 651), 55 L. R. A. 822.

“The general rule is that a contractor, manufacturer or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture or sale of the articles he handles.”

Huset vs. J. I. Case Threshing Mach. Co., 120  
Fed. 865, at pages 867 and 868.

“So, when a manufacturer sells articles to the wholesale or retail dealers, or to those who are to use them, injury to third persons is not generally the natural or probable effect of negligence in their manufacture, because (1) such a result cannot ordinarily be reasonably anticipated, and because (2) an independent cause—the responsible human agency of the purchaser—without which the injury to the third person would not occur, intervenes, and, as Wharton says, ‘insulates’ the negligence of the manufacturer from the injury to the third person.”  
Huset vs. J. I. Case Threshing Mch. Co., *supra*.

In the case last cited the court exhaustively discusses the liability of the third parties who have no contractual relations with the plaintiff and cites many authorities to the effect that there can be no liability for simple acts of negligence where there is no contractual relations between the plaintiff and the defendant, except in the three following instances:



1. An act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy or affect human life.

2. An owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises.

3. One who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated.

It is true in the Huset case the Circuit Court of Appeals for the Eighth Circuit reversed the trial court for sustaining a demurrer to the complaint, but the complaint alleged that the defect in the machinery which occasioned the injury was purposely concealed by the defendants, and the court in the closing paragraph of its opinion said:

“It is perhaps improbable that the defendant was possessed of the knowledge of the imminently dangerous character of this threshing machine when it delivered it, and that upon the

trial of the case it will be found to fall under the general rule which has been announced in an earlier part of this opinion. But upon the facts alleged in this complaint, the act of delivering it to the purchaser with a knowledge and a concealment of its dangerous condition was so flagrant a disregard of the rule that one is bound to avoid any act imminently dangerous to the lives and health of his fellows that it forms the basis of a good cause of action in favor of any one who sustained injury therefrom."

In the case at bar the amended complaint does not allege any fraud, deceit or concealment on the part of the defendants; nor does it allege ignorance on the part of the plaintiff of the character of Gold Creek and its periodical freshets; nor does it allege that the insufficiency of the bulkheads and dam to withstand the force of the waters of such freshets was not obvious to one familiar with the character of Gold Creek.

Plaintiff purchased her property subsequent to the construction of the bulkheads and dam and must have been as familiar with Gold Creek as the defendants because the contrary is not alleged. She was, therefore, just as capable of determining for

herself whether the dam and bulkheads and new channel were sufficient to safeguard her property as were the defendants.

We think the judgment of the trial court correctly declared the law and therefore should be affirmed.

Respectfully submitted,

H. L. FAULKNER,  
Juneau, Alaska.

LYONS & ORTON,  
Seattle, Washington.

*Attorneys for Defendants in Error.*

United States  
14  
Circuit Court of Appeals  
For the Ninth Circuit.

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E. L. COBB, as Trustee in Bankruptcy of the  
CRAIG LUMBER COMPANY, a Corpora-  
tion, Bankrupt,

Appellant,

vs.

McDONALD-WEIST LOGGING COMPANY, a  
Corporation,

Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for the  
District of Alaska, Division No. 1.

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FILED  
JUL - 2 1927  
F. D. MONCKTON,  
CLERK





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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E. L. COBB, as Trustee in Bankruptcy of the  
CRAIG LUMBER COMPANY, a Corpora-  
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

JOHN H. COBB, Esq., Juneau, Alaska,

Attorney for Appellant.

Messrs. RODEN & DAWES, Juneau, Alaska,

Attorneys for Appellee.

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In the District Court for the District of Alaska, Div.

No. One, at Juneau.

IN BANKRUPTCY— No. —.

Claim No. 31.

In the Matter of the CRAIG LUMBER COMPANY,  
a Corporation,

Bankrupt.

**Claim of MacDonald-Wiest Logging Company.**

United States of America,

Territory of Alaska,

Division No. One,—ss.

At Juneau, in said District of Alaska, Division No. One, on May 22d, 1919, came L. J. McDonald, of Ketchikan Alaska, in said Division and District, and made oath and says: That the said Craig Lumber Company, a corporation, the corporation for whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to the said McDonald-Wiest Lumber Company, a corporation, in the sum of \$27,-871.50, with interest thereon, from December 20th, 1918, at 8% per annum amounting in all to \$28,328.90; that the consideration of said debt is as follows:



“For logs sold and delivered to the said Craig Lumber Company, a bankrupt, during the period from January 1st, 1918, to December 20th, 1918.”

And that no part of said debt has been paid and that there are no offsets nor counterclaims to the same; that said debt was due on December 20th, 1918, and is still due, and that no note has been received for such account nor any judgment rendered thereon, and that said McDonald-Wiest Lumber Company has not, nor has any person by its order or to its knowledge or belief for its use had or received any manner of security for said debt whatever, except that said company claims and holds a lien on logs and lumber as more particularly set out in the hereto attached copy of complaint, and that this deponent is the treasurer of the said McDonald-Wiest Lumber Company, and is duly authorized by said corporation [1\*] to make this affidavit and proof for the said corporation and in its behalf.

L. J. MacDONALD.

Subscribed and sworn to before me this May 22d, 1919.

[Notarial Seal]

H. L. FAULKNER,  
Notary Public for Alaska.

My commission expires Nov. 14, 1922. [2]

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\*Page-number appearing at foot of page of original certified Transcript of Record.

In the United States District Court for Alaska,  
Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

In the Matter of the CRAIG LUMBER COMPANY,  
a Corporation,

Bankrupt.

**Objections of the Trustee to the Claim and Lien of  
the MacDonald-Wiest Lumber Co., a Corpo-  
ration.**

Now comes E. L. Cobb, Trustee of the Estate of the above-named Craig Lumber Company, bankrupt, and objects to the proof of claim filed by the MacDonald-Wiest Lumber Company, a corporation of the State of Washington and prays that the same may not be allowed on the following grounds, to wit:

1. Said claim is not a claim provable in bankruptcy, for the reason that the said MacDonald-Wiest Lumber Company is a foreign corporation; that it never complied with the laws of Alaska concerning foreign corporations doing business in Alaska and at no time, and is not now authorized to do business in Alaska; that the said claim is founded upon and grows out of a contract for cutting logs in Alaska, which is the business of said company, which said contract was, and is, illegal and void.

2. Said MacDonald-Wiest Lumber Company falsely asserts and alleges the consideration and amount of its claim in this: Said claim alleges the consideration to be "For logs sold and delivered to the said Craig Lumber Company, a Bankrupt, during

the period from January 1st, 1918, to December 20th, 1918.”

That in truth and in fact the consideration for said claim was a contract made by and between the said bankrupt and said claimant in the year 1917, whereby the claimant undertook to cut, put in the water and boom logs belonging to the Craig Lumber Company and situated in Alaska at the rate of Ten (\$10.00) Dollars per M. B. M.

That said contract was illegal and void for the reasons [3] set out in the first paragraph hereof, but if the same had been legal, there was not, and is not due thereon, the sum of \$28,328.90, for that, the statement, “that no part of said debt has been paid” is untrue; that in fact, the Craig Lumber Company, bankrupt, paid upon said contract, the sum of \$12,660.30, and there was not due on said contract (if the same had been legal) to exceed the sum of \$19,527.30.

3. The claim of a lien upon logs and lumber belonging to the bankrupt estate made by the said MacDonald-Wiest Lumber Company, a corporation, to secure said claim is void, because (1) the said company is a foreign corporation, and had not at the time it was engaging in the business out of which said claim grew and at the time it attempted to fix its alleged lien by filing its claim of lien, complied with the laws of Alaska, so as to be legally authorized and empowered to do business in Alaska. (2) The claim of lien filed by the said MacDonald-Wiest Lumber Company is false and fraudulent in this: The said claim alleges that under its said contract with the

Craig Lumber Company, Bankrupt, it had cut, felled and boomed 3,762,310 feet B. M. of logs, and had only been paid the sum of \$9,748.50, while in truth and in fact the said MacDonald-Wiest Lumber Company had under its said contract cut, felled and boomed not to exceed 3,218,760 feet B. M., and had been paid the sum of \$12,660.30. That no claim of lien for the amount due under said contract (if the same had been legal) was ever filed by the said MacDonald-Wiest Lumber Company.

4. The said MacDonald-Wiest Lumber Company is a corporation, and during the year 1918, and prior thereto, was engaged in the business of contracting on a large scale for the getting out and delivery of logs from the forests to lumber-mills, which contracts it carried out and performed by the employment of large forces of laborers, but itself did no labor whatsoever, and is not "a person" to whom a lien is given on logs within the purview and meaning of the statutes of Alaska (Compiled Laws section No. 709) providing for liens [4] upon logs.

5. The claimed lien upon 2,000,000 feet of lumber at the mill of the Craig Lumber Company, Bankrupt is void, for the reasons aforesaid, and for the further reason, that said notice of lien fails to show that the MacDonald-Wiest Lumber Company performed any labor or rendered any service in the manufacture of said lumber, and in truth and in fact said company did not perform any labor or render any service in the manufacture of said lumber.

WHEREFORE the trustee prays that the said claim of the MacDonald-Wiest Lumber Company be



disallowed and expunged, and for such other orders as to the Court may seem proper.

J. H. COBB,

Attorney for the Trustee.

United States of America,  
Territory of Alaska,—ss.

E. L. COBB, being first duly sworn, on oath, deposes and says: I am the trustee above named. The above and foregoing objections are true to the best of my knowledge and belief.

E. L. COBB.

Subscribed and sworn to before me this the 16th day of August, 1919.

[Notarial Seal]

J. H. COBB.

Notary Public in and for Alaska.

My commission expires June 8, 1923.

Service of the above and foregoing objections of the trustee admitted this the 18th day of August, 1919.

JOHN RUSTGARD,

Attorney for the MacDonald-Wiest Lumber Company.

Filed August 18, 1919. H. B. Lefevre, Referee in Bankruptcy, First Division of Alaska, Box 613 Juneau, Alaska. [5]



In the United States District Court for the District  
of Alaska, Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

In the Matter of CRAIG LUMBER COMPANY, a  
Corporation,

Bankrupt,

E. L. COBB, Trustee,

Petitioner,

vs.

McDONALD-WIEST LOGGING COMPANY,  
Respondent.

JOHN H. COBB, Esq., for Petitioner.

JOHN RUSTGARD, Esq., for Respondent.

**Decision of Referee.**

This controversy arose upon the petition of the trustee objecting to the allowance of the claim of the McDonald-Wiest Logging Company, as a lien claim, upon the grounds:

1. That the respondent was without right of recourse to prosecute his cause for the reason that it was a corporation and had not complied with such requirements of the laws of Alaska as would permit it to maintain actions in the courts, and upon other grounds hereinafter set forth. The referee having decided against the respondent upon the first grounds, respondent appealed and upon such appeal the Judge reversed the referee, whereupon the petitioner appealed to the Circuit Court of Appeals, where the decision of the Judge was sustained and

the controversy was again brought before the referee for his decision upon the other questions of law involved in the controversy as follows:

1. That respondent is a corporation and as such has no right of lien.

2. That natural persons comprising the corporation have no right of lien.

3. That some of the logs being converted into lumber the lien does not follow into the lumber. [6]

4. That the liened logs were mixed with other logs and that there being no way to designate which lumber came from such logs so liened and, therefore, to such extent, the lien is lost.

#### I.

The McDonald-Wiest Lumber Company is and during all the time herein mentioned was a corporation duly organized and existing as such under and pursuant to the laws of the State of Washington; that said corporation had paid its license fee required by the laws of Alaska for the years 1918, 1919 and 1920, in due time; that the following documents, but none others, were filed by the said corporation in the office of the Secretary of the Territory of Alaska, to wit:

1. Certified copy of articles of incorporation, filed January 28, 1918.
2. Appointment and consent of L. J. McDonald as resident agent, filed January 28, 1918.
3. Financial statement signed by G. B. McDonald as acting President and as Secretary, but not sworn to nor attested by a majority of the directors, filed February 16, 1918.

4. Financial statement sworn to by J. B. McDonald as President and Secretary, but not attested by a majority of the directors, filed February 27, 1919.

That the following documents were filed by said corporation in the office of the clerk of the Court for the First Division, at Juneau, Alaska, to wit:

1. Certified copy of articles of incorporation, filed December 12, 1917.
2. Appointment of L. J. McDonald as resident agent, filed December 12, 1917.

The consent of the agent attached to the resolution appointing the agent above referred to reads as follows: [7]

“I, L. J. MacDonald, a resident of the First Judicial Division of the Territory of Alaska, residing at Craig in said Division, having been appointed resident agent for the McDonald-Wiest L. Co., a foreign corporation, hereby accept said appointment for all purposes set forth in the foregoing certificate.

Dated at Craig, Alaska, this 20th day of November, 1917.

\_\_\_\_\_,”

That the name “L. J. MacDonald,” the word “First,” immediately prior to the words “Judicial Division,” and the “MacDonald-Wiest L. Co.” and the name “Craig” are all written with pen and are in the handwriting of L. J. MacDonald, the remainder of the Certificate being printed.

3. Annual report, filed February 11, 1919, sworn to by the President but not attested by the directors.

## II.

That the Craig Lumber Company, a corporation, the bankrupt above named, during all the time herein mentioned was organized and existing as a corporation under and by virtue of the laws of the State of Washington, and had complied with the laws of the Territory of Alaska authorizing foreign corporations to do business in said Territory.

## III.

That on or about the 2d day of January, 1918, at Wrangell, Alaska, the MacDonald-Wiest Lumber Company entered into verbal contract with the Craig Lumber Company, whereby the former was to cut and boom logs for the Craig Lumber Company from a timber tract on Long Island in the First Division of Alaska, said tract being on the United States Forest reserve and having been purchased by the Craig Lumber Company from the United States Government. The MacDonald-Wiest Lumber Company agreed to cut and boom the logs from said timber tract and make the same ready for towage for the price of ten dollars per thousand feet board measure, the Craig Lumber Company to do the towing, and the said [8] Craig Lumber Company agreed to pay the MacDonald-Wiest Lumber Company the sum of ten dollars for every thousand feet of logs cut and boomed by it from the said tract. The Craig Lumber Company agreed to pay all stumpage charges, do all its own towing at



its own risk, tow all the scows, floats, float-houses and general logging equipment of the MacDonald-Wiest Lumber Company from Wrangell, Alaska, to Howkan, Alaska, the place where the logs were to be cut, free of charge; to return all boomsticks to the MacDonald-Wiest Lumber Company at Howkan, or, if the Craig Lumber Company kept and used any boomsticks, to pay for the same at the rate of ten dollars per thousand feet, board measure; to furnish all necessary boom chains, free of cost, and to make payment for each raft as soon as the same was completed and taken in tow by the Craig Lumber Company's tug.

The MacDonald-Wiest Lumber Company, under this contract, during the year 1918 cut, rafted and delivered to the Craig Lumber Company 3,376,300 feet of logs, and under said contract cut but did not raft or deliver 350,000 feet board measure of logs, the said last amount of logs being at the spar-tree on the tract in question and ready for rafting at the time the MacDonald-Wiest Lumber Company was ordered by the bankrupt to discontinue cutting under the contract. The logs delivered by the MacDonald-Wiest Lumber Company to the bankrupt during the year 1918 were towed by the Craig Lumber Company from the MacDonald-Wiest Lumber Company's camp near Howkan, Alaska, to the Craig Lumber Company's mill at Craig, Alaska, and sawed into lumber by the Craig Lumber Company, except that some of said logs, amounting to some 250,000 feet, were in the log-pound at said Craig Lumber Company's mill at Craig, Alaska, unsawed, at the



time the said company became bankrupt. Under and pursuant to the contract above mentioned, the [9] MacDonald-Wiest Lumber Company cut for and delivered to the Craig Lumber Company the following rafts, on the dates below given, to wit:

1918.					
June	1.	Raft No. 1	342,780 feet		\$ 3,427.80
"	1.	Raft No. 2	264,000 "		2,640.00
July	6.	Raft No. 3	302,000 "		3,020.00
"	31.	Raft No. 4	420,010 "		4,200.10
Aug.	1.	Raft No. 5	291,120 "		2,911.20
"	1.	Raft No. 6	287,310 "		2,873.10
Sept.	30.	Raft No. 7	297,870 "		2,978.70
Oct.	10.	Raft No. 8	269,260 "		2,692.60
"	10.	Raft No. 9	330,860 "		3,308.60
"		Raft No. 10	288,960 "		2,889.60
Nov.	22.	Raft No. 11	282,130 "		2,821.30
		Boomsticks	53,126 "		531.26
		"	350,000 "		3,500.00

---

3,779,426 ft. @ \$10. \$37,794.26

The operations of claimant under said contract commenced in the month of April, 1918. The two first rafts mentioned in the above list were delivered prior to the first day of July, 1918. The third raft above mentioned was delivered on the 6th day of July, 1918, and the fourth raft above named was delivered on the 31st day of July, 1918. The logs in the fourth raft above mentioned were all cut during the month of July, 1918, and the logs in all the other rafts were cut and delivered subsequent to the first day of July, 1918. All the logs delivered subsequent to August, 1918, were cut after the first of August, 1918.

That on the 20th day of December, 1918, the Craig Lumber Company directed the MacDonald-Wiest Lumber Company to discontinue cutting logs under the aforementioned contract and to discontinue their operations. That at that time claimant had logs at the spar-tree on the tract in question amounting to 300,000 feet; that the same were ready to be made into rafts, and that the actual cost of booming the said logs would be not to exceed one dollar per thousand feet board measure, [10] that at the time the said operations were so discontinued the Craig Lumber Company had paid to the MacDonald-Wiest Lumber Company under said contract the sum of \$10,544.57, and no more, and that no more has been paid on said account since; that said sum had been paid in installments by way of bank checks or freight advances or by merchandise, and so credited by the MacDonald-Wiest Lumber Company upon the first deliveries made, each payment credited being applied upon the oldest claim against the bankrupt; and that at the time the Craig Lumber Company was adjudged bankrupt there was due and owing claimant upon said account above set out the sum of \$27,871.50. That on the thirtieth day of December, 1918, and within six months after all the work had been done in cutting said logs for which said indebtedness had been incurred, claimant filed its lien, duly verified, in the office of the Recorder of Ketchikan Recording Precinct, within which said logs and the lumber sawed therefrom were located and situated, and within which the work had been done, which lien was filed pursuant to the provisions of

Sections 709 to 715, inclusive, of the Compiled Laws of Alaska, a copy of which lien statement so filed is hereto attached and made a part of this statement of facts.

That during all the time herein mentioned the sole stockholders of the MacDonald-Wiest Lumber Company were J. B. MacDonald, L. J. MacDonald, Allan MacDonald and C. P. MacDonald, all brothers. During the year 1918 the officers of the said corporation were J. B. MacDonald, President and Secretary, and L. J. MacDonald, Treasurer. That all of the said stockholders performed manual labor in the cutting and booming of the aforementioned logs. G. B. MacDonald helped to fall timber, assisted in booming or rafting, kept the books and cut the wood for the cook-house. L. J. MacDonald, Treasurer, performed the duty of timber-faller, at times was engineer in charge of the donkey-engine used in getting the logs into the water, and assisted in booming up and other [11] work. Allan MacDonald, stockholder, worked as hook-tender and at times helped to fall timber and also did the blacksmith work. C. P. MacDonald worked as engineer on the other donkey, performed the duty of high climber and rigging the spar-tree (high lead), and generally assisted in the actual work of cutting and booming said logs. All the said MacDonalds, during the year 1918, averaged not less than twelve hours a day during seven days a week of the very hardest labor in the actual work of cutting said logs for the Craig Lumber Company from about the first day of March, 1918, to the 20th day of December, 1918.

That during the season when the logs were being cut the said MacDonalds had an average of *our* men to assist them, some of the time they had none, some of the time they had two other men and at times they had as many as six or eight, but the average would be four men in addition to themselves.

That the logs in question, with the exception of those left at the spar-tree and one raft of 350,000 feet ready for delivery at Howkan, were towed to the Craig Lumber Company's sawmill at Craig and there placed in the log-pound of the mill, ready for sawing into lumber. All of said logs, except a raft of about 300,000 feet in the log-pound at the mill, were sawed at the said bankrupt's mill and piled in the lumber-yard of said bankrupt company at Craig. The remainder was left in the log-pound at the time the sawmill operations closed and were taken over by the trustee in bankruptcy, as was also the lumber in the yard. Of all the logs received or sawed by the bankrupt company at the said mill, eighty per cent consisted of the logs above mentioned and cut by claimant, the MacDonald-Wiest Lumber Company. The other twenty per cent received by or cut by the bankrupt were furnished by others not interested in the MacDonald-Wiest Lumber Company. That the lumber cut from the said logs furnished by the MacDonald-Wiest Lumber Company was in the lumber-yard, mixed with lumber cut from the logs furnished by other parties, at the time of bankruptcy. That some [12] three million feet, more or less, as the inventory of the trustee may show, of the lumber cut from said logs was in the lumber-



yard of the bankrupt at the time the trustee was appointed. That the MacDonald-Wiest Lumber Company claims a lien upon the said logs and the lumber cut therefrom and remaining in the mill-pound at Craig or in the form of rafts at Howkan or in the form of lumber in the mill-yard above mentioned, and claims the prior right to have the funds received by the trustee from the sale of said logs and lumber applied upon the claim above named of the MacDonald-Wiest Lumber Company.

COPY.

LABORER'S LIEN, AMENDED.

MacDONALD-WIEST LUMBER CO.,

Claimant,

vs.

CRAIG LUMBER CO., a Corporation,

Defendant.

NOTICE IS HEREBY GIVEN, that the MacDonald-Wiest Lumber Company, a corporation organized under the laws of the State of Washington and doing business in Alaska, claims a lien upon the following logs, lumber and personalty and improvements, to wit:

One certain raft of logs situated in the Mission Cove, Long Island, Howkan, Southeastern Alaska, consisting of 300,000 feet, more or less in a boom; together with 300,000 feet of loose logs piled at a spar-tree close to Howkan, Alaska; together with 275,000 feet of logs in a pocket boom situated above the mill in the vicin-



ity of Craig, Alaska; said logs were all cut and felled from standing timber at and near Howkan, Alaska, by said claimant between March 1, 1918, and December 20, 1918, consisting of spruce and hemlock;

Together with 2,000,000 feet of lumber, of all dimensions principally rough, with some dimension lumber, all of which remains and now is situated in the yard of said defendant where the same was manufactured, together with the dock, one cook-house and four bunkhouses, all in said yard, and all of said lumber and buildings and improvements having been manufactured out of 3,112,310 feet of logs, cut and felled by said claimant and furnished to said defendant under the contract herein set forth.

Said claimant claims a lien upon all aforesaid logs, lumber and improvements for labor performed upon and assistance rendered in obtaining, securing, cutting and manufacturing said logs and lumber at the instance of said owner.

That the name of the owner, or reputed owner, of said logs and lumber is the Craig Lumber Company, a corporation, organized under the laws of the State of Washington and doing business in Alaska; that [13] said Craig Lumber Company employed said MacDonald-Wiest Lumber Company to perform such labor and render such assistance upon the following terms and conditions: Defendant purchased the standing timber from which said logs were cut, and employed claimant to cut and fall and boom the same at Howkan, Alaska, at an agreed compensa-

tion of \$10.00 per thousand B. M., payable when boomed at Howkan, Alaska, defendant to take said logs at said point ready for delivery to its tow-boat; that claimant cut, felled and boomed 3,762,310 b. d. ft. of logs under said contract, and has faithfully performed and fully complied with said contract on its part, and claimant performed labor and assisted in cutting, falling and manufacturing said logs and lumber for a period beginning March 1, 1918, and ending December 20, 1918, and thirty days have not elapsed since that time; that the amount of said claimant's demand for such services is \$37,620.00; that no part thereof has been paid, except \$9,748.50, and there is now due and remaining unpaid thereon, after deducting all just credits and offsets, the sum of \$27,871.50, in which amount claimant claims a lien upon said property.

MacDONALD-WIEST LUMBER COMPANY.

By L. J. MacDONALD,

Manager.

United States of America,  
Territory of Alaska,—ss.

L. J. MacDonald, being first duly sworn, on his oath says: That he is the treasurer and manager of the above MacDonald-Wiest Lumber Company, and by resolution duly authorized to file and sign the foregoing claim, that he has read the same, knows the contents thereof, and believes the same to be true.

L. J. MacDONALD.

Subscribed and sworn to before me this 30th day of December, 1918.

CHAS. E. INGERSOLL,

Notary Public for Alaska.

My commission expires Oct. 5, 1922.

No. 107.

This certifies that the within instrument was filed for record on the 31 day of Dec., 1918, at 2 o'clock P. M. in vol. 2 of Liens, at page 10, of the Records of said office at Ketchikan, Alaska.

WM..T. MAHONEY,  
Recorder.

United States of America,  
Ketchikan Precinct No. 8,  
Div. No. 1, Alaska,—ss.

I, Henry C. Story, U. S. Commissioner for the Ketchikan Precinct No. 8, Div. No. 1, Alaska, and Recorder for the Ketchikan Recording District No. 8, Alaska, do hereby certify that the attached Laborer's Lien Amended, filed by MacDonald-Wiest Lumber Company, Claimant, vs. Craig Lumber Co., a Corporation, Defendant, is a full, true, and correct copy of the original of the same, and the whole thereof, as it appears of record in the records of the Ketchikan Recording Office in my office in Volume 2 of Liens at page 10, filed for record and recorded on the 31st day of December, 1918, at 2 o'clock P. M.

In Testimony Whereof I have hereunto set my hand and the official seal of my office on this 9th day of March, 1918.

HENRY C. STORY,  
U. S. Commissioner for Ketchikan Precinct No. 8,  
and Recorder for said Precinct, Alaska.

Filed September 27, 1919. H. B. LeFevre, Referee in Bankruptcy, First Division in Alaska. Box 613, Juneau, Alaska. [14]

This decision is based upon the foregoing facts proven at the hearing before the referee on December 20, 1920:

From which statement of facts the referee concludes and decides:

1. It does not seem reasonable that either a corporation or a contracting firm could be designated a laborer (defined in Shultz vs. Shively, 143 P. 1115, and in Day vs. Green, 127 P. 772) under the meaning of the section. The principal of a laboring proxy under the Alaska labor lien law is precluded from all the rights of the lienor for the right of lien is not assignable, though the lien, when perfected by the actual laborer, may be. An artificial person can have labor performed but cannot labor. The doctrine is very plainly stated in D. C. L., V. 17, p. 1118, par. 43, Sec. 709, C. L. A., is adopted from the Oregon Code, and its text is quoted *verbatim* by the Supreme Court of Oregon in its decisions. In none of the Oregon cases traceable through the Pacific Digest has the Court in any way intimated that corporations and contracting firms are laborers within the scope of the section which explains: "The cook in a logging camp and any and all others who may assist in or about a logging camp shall be regarded as a person who assists in obtaining or securing the saw logs \* \* \* "

2. Contractors, even though they labor individually, have no right of lien. *Ibid.*

3. The lien attaches to the material of the logs even after it has been converted into lumber.

4. Confusing the output from the logs does not



destroy the lien which attaches to the logs after they are converted into lumber, that is to say, the lumber, especially when lumber, or the money derived from its sale, is still in the hands of the party who contracted for the labor.

Upon that respondent is a corporation and a contractor, its claim as a lien claim is disallowed.

December 29, 1920.

H. B. LEFEVRE,  
Referee in Bankruptcy,  
First Division of Alaska,  
Box 613 Juneau, Alaska. [15]

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In the United States District Court for the District  
of Alaska, Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

In the Matter of CRAIG LUMBER COMPANY, a  
Corporation.

E. L. COBB,  
Bankrupt.  
Petitioner,  
vs.

MCDONALD-WIEST LOGGING COMPANY,  
Respondent.

JOHN H. COBB, ESQ.  
JOHN RUSTGARD, Esq.

**Order Allowing Claim.**

At Juneau, December 30th, 1920.

This cause came on for hearing before the referee upon the appearance of the attorneys for the parties on the 20th day of December, 1920, John H. Cobb,



Esq., appearing for the petitioner and John Rustgard, Esq., appearing for the respondent. Whereupon John Rustgard, Esq., on behalf of the respondent, submitted record evidence and respondents statement of facts. Whereupon the hearing was continued for the day and on the 21st day of December, 1920, John S. Cobb, Esq., filed a statement of facts on behalf of the petitioners, and the parties having submitted their respective arguments, citations and briefs, and it appearing from the records and files of this Court that the referee has regained jurisdiction of the controversy, limited to the questions at issue that have not been decided, and having rendered and entered his decision, in which all matters and things at issue are fully set out; that all necessary notice has been given to establish said claim as a general claim, effective and of full force and virtue from the [16] date of its filing; that all the issues in controversy are of law and no issues upon the facts have been raised, the Court hereby adopts the findings in the referee's decision herein; and all matters and things being heard, understood and considered, it is

ORDERED That the claim of the McDonald-Wiest Logging Company Numbered 31, for \$28,328.90 with interest amounting to \$457.40, be and hereby is disallowed as a lien claim; and it is

ORDERED That the status of said claim be and hereby is established as a general claim with all rights and benefits attaching and of full force and virtue at and from the date of its filing; and it is

ORDERED That, upon the McDonald-Wiest Logging Company, respondent, consenting to the status

of said claim as a general claim, the trustee do pay said respondent, the McDonald-Wiest Logging Company, from the moneys of the estate in his hands, twelve per cent of the amount of said claim and of the interest thereon due, and that said claim do fully participate in all dividends hereinafter paid to the general creditors.

H. B. LEFEVRE,  
Referee in Bankruptcy,  
First Division of Alaska,  
Box 613 Juneau, Alaska. [17]

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In the United States District Court for Alaska,  
Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

In the Matter of THE CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

In the Matter of the Claim of the MacDONALD-WIEST CO., a Corporation.

**Stipulation in Re Certain Facts.**

It is hereby stipulated, for the purposes of the decision of the above matter in the District Court, that the following facts are true, and were before the Referee, and the decision of the Referee, expunging the claim was based thereon.

I.

The MacDonald-Wiest Company is a corporation of the State of Washington.

## II.

The contract upon which the claim in controversy is based, and out of which it grows, was made in the Territory of Alaska on the 2d day of January, 1918, and was to be performed entirely within the Territory of Alaska.

## III.

On December 12th, 1917, the MacDonald-Wiest Company filed in the office of the clerk of the District Court for the First Division, the *follow* papers, and no others to wit:

(a) A certified copy of its Charter or Articles of Incorporation.

(b) Its written consent to be sued, and the appointment of L. J. MacDonald as its agent.

(c) A document attached to document (b) filled out in the handwriting of L. J. MacDonald which was, in form, an acceptance of the appointment, but the same was never subscribed by the said L. J. MacDonald.

## IV.

The MacDonald-Wiest Company filed in the office of the Secretary of Territory of Alaska the following documents and no others, at the dates mentioned, to wit: [18]

(a) Charter filed January 28th, 1918.

(b) Appointment of agent and acceptance of appointment filed January 28th, 1918.

(c) Annual statement filed February 16th, 1918.

(d) Annual statement filed February 27th, 1919.

## V.

The Annual Statement filed February 16th, 1918,

was not verified by the President and Secretary of the MacDonald-Wiest Company, nor attested by the directors, and the Annual Statement filed February 27th, 1919, was not attested by a majority of the directors.

JOHN RUSTGARD,  
Attorney for Appellant.

J. H. COBB,  
Attorney for Trustee.

Filed in the District Court, District of Alaska,  
First Division. Dec. 15, 1919. J. W. Bell, Clerk.  
By —————, Deputy. [19]

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In the District Court for Alaska, Division No. 1, at  
Juneau.

IN BANKRUPTCY—No. 31.

In the Matter of THE CRAIG LUMBER COM-  
PANY, a Corporation,

Bankrupt.

In the Matter of the Claim of the MacDONALD-  
WIEST LOGGING CO.

**Petition of Trustee for Review.**

Comes now the trustee in bankruptcy, E. L. Cobb,  
by his attorney, and prays the Court to review the  
decision and order of the Referee herein, made and  
entered on the 30th day of December, 1920, allowing  
the claim of the McDonald-Wiest Logging Co. for  
the sum of \$28,328.90, besides interest, as a general  
claim against the estate; and the trustee alleges that

the said decision and order are erroneous in the following respects, to wit:

1. It was established by the evidence that the said claimant was a foreign corporation, and had failed to comply with the laws of Alaska governing foreign corporations doing business in the Territory, and the Referee should have disallowed said claim as a whole on that ground.

2. The evidence failed to show, in any event, more than about \$24,000.00 due, in that the claimant was not entitled to recover and prove for the logs not boomed but left at the spar-tree, and which the record shows were with the consent of claimant abandoned by the trustee.

And the trustee prays that upon such review the claim of the said Logging Company be wholly disallowed.

J. H. COBB,

Attorney for Trustee.

Service of the foregoing petition and receipt of a copy thereof is admitted this the 31st day of December, 1920.

JOHN RUSTGARD,

Attorney for said Claimant, the McDonald-Wiest Logging Co.

Filed December 31, 1920. H. B. Lefevre, Referee in Bankruptcy. [20]



In the District Court of the United States for the  
District of Alaska, Division Number One, at  
Juneau.

**IN BANKRUPTCY—No. 31.**

In the Matter of CRAIG LUMBER COM-  
PANY, a Corporation,

Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

McDONALD-WIEST LOGGING COMPANY,  
Respondent.

JOHN H. COBB, Esq., for Petitioner.

JOHN RUSTGARD, Esq., for Respondent.

**Certificate of Referee to Judge.**

I, H. B. LeFevre, one of the referees of said  
court in bankruptcy, do hereby certify that in the  
course of the proceedings in said cause before me  
the questions arose that are shown in my decision  
of the controversy with a summary of the evidence  
relating thereto and the findings and order of the  
referee thereon.

And the said questions are certified to the Judge  
for his opinion thereon.

Dated at Juneau the 31st day of December, A. D.  
1920.

H. B. LE FEVRE,  
Referee in Bankruptcy, First Division of Alaska,  
Box 613 Juneau, Alaska.

Filed in the District Court, District of Alaska,  
First Division. Dec. 31, 1920. J. W. Bell, Clerk.  
By V. F. Pugh, Deputy. [21]

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In the District Court for the District of Alaska,  
Division No. One, at Juneau.

No. 2057-A.

In the Matter of THE CRAIG LUMBER COM-  
PANY, a Corporation.

Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

McDONALD-WEIST LOGGING COMPANY,  
Respondent.

J. H. COBB, for Petitioner.

RODEN and DAWES, for Respondent.

**Memorandum Opinion.**

Delivered ———, 1921.

JENNINGS, Judge:

The McDonald-Weist Logging Company is a corporation organized under the laws of the State of Washington. It made an abortive effort to comply with the laws of the Territory of Alaska requiring corporations to file certain papers before doing business in the said territory. The Craig Lumber Company was also a foreign corporation, and duly complied with the requirements of the laws of said

territory concerning the doing of business within the said territory.

On the 2d day of January, 1918, these corporations entered into a contract whereby the former was to cut logs for the latter. The logs to be cut belonged to the Government. The McDonald-Weist Company was to cut and raft the logs; the Craig Lumber Company was to pay the Government stumpage, and to do all the work of towing the logs to their mill situated at Craig. [22]

Under this contract the McDonald-Weist Company cut and rafted 3,779,426 feet of logs on the dates hereinafter mentioned and of the money value set opposite the respective dates, to wit:

1918

June 1st .....	\$6067.80
July 6th .....	3020.00
July 31st .....	4200.10
August 1st .....	5784.30
September 30th .....	2978.70
October 10th .....	8890.80
November 22d .....	6852.56

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Total value.....\$37794.26

On December 20, 1918, the Craig Lumber Company directed the McDonald-Weist Company to discontinue cutting logs under the aforementioned contract. At that time the McDonald-Weist Company had in the woods 300,000 feet of logs already cut, but not rafted, under the contract. The Craig Lumber Company made certain payments from time to time, and on the said 20th of December,

1918, its total payments had amounted to the sum of \$10,544.57; since said date it has made no payments.

On the 19th day of March, 1920, the Craig Lumber Company was adjudged to be a bankrupt. A trustee was duly elected on May 28, 1919. The McDonald-Weist Company duly filed with the trustee a claim for \$27,871.50, alleging that amount to be due under said contract, maintaining that it has a preferred claim for that amount on the proceeds of the sale of logs and the lumber manufactured therefrom, (said proceeds now being in the hands of the trustee), by reason of a lien notice which it had theretofore filed.

The trustee objected to the claim upon two grounds,—1st, that as the McDonald-Weist Company had not complied with the requirements of the statute it was not authorized to do business in Alaska and any contract made by it was void and could not be enforced in the bankruptcy court; 2d, that even if it had power to enforce its claim in the bankruptcy court, still its lien had no standing in court on account of the fact, as alleged, that the statute gives a lien only to persons performing labor upon logs and not to contractors cutting logs.

[23]

The referee decided, 1st, that the fact that claimant was a foreign corporation which had not complied with said statute did not preclude it from asserting its lien or filing its claim in bankruptcy; 2d, that the statute of Alaska gives a lien only to laborers and not to contractors, and that as the

claimant was a contractor and not a laborer it follows as a matter of law that the said claimant had no lien. The referee allowed the claim but refused to make it a preferred claim.

Both sides appealed from the decision of the referee.

The matters certified to the Court are as follows: Did the referee commit error in holding (1) that the McDonald-Weist Company had standing in court to prosecute this claim; (2) that the said company did not have a preferred claim?

As to the first question, the trustee calls the attention of the Court to section 660 of the Compiled Laws of Alaska, 1913, which provides,

“That if any foreign corporation or company fails to comply with the provisions of this chapter (chapter 23) all its contracts with citizens of the District shall be void as to the corporation or company, and no court of the District or of the United States shall enforce the same in favor of the corporation or company so failing.”

It is difficult, however, to see how this section at all affects the matter in controversy, for the reason that the Craig Lumber Company is not a citizen of the District. It is itself a foreign corporation, and therefore a provision of law that no court shall enforce the same (meaning thereby contracts with citizens of the District) does not apply.

Our statute relating to foreign corporations doing business in the District of Alaska does not make void the contracts of corporations which do business



without complying with the statutory requirements, except such contracts as are made with citizens of Alaska. The contracts of a noncomplying corporation with others than citizens of Alaska is voidable at the election of the other [24] party. The statute also prescribes a penalty for noncomplying corporations doing business, to wit: They shall forfeit the sum of \$25.00 per day. (See section 657.)

The effect of such a provision is not to make contracts void.

5 Thompson on Corporations, sec. 6708.

Two foreign corporations may do business with each other within the District of Alaska, without filing any articles, appointing any agents, or taking any other steps, and just so long as they deal with each other only, their contracts are voidable, not void. In such case they would incur the danger of the Attorney General bringing a suit to recover \$25.00 per day for every day either of them shall so neglect to file the papers required by the statute. It is only when a foreign corporation which has failed to comply with the statutory requirements deals with a citizen of the District that the contracts are void, and the Court is enjoined not to enforce the same in favor of the corporation or company which so fails.

“Voidable at the election of the other party thereto” means, in this case, “voidable at the election of the Craig Lumber Company.” The question, therefore, is, has the Craig Lumber Company ever elected to avoid the contract in question? It is apparent, I think, that so far from electing to avoid

the contract in question, the Craig Lumber Company has emphatically elected to stand by the contract. It has received benefits from the contract and has paid more than \$10,000.00 in various sums on account from time to time,—but now, after the contract has been in force for more than twelve months, the trustee, who was only appointed on May 28, 1919, assumes to make an election. I do not think he has the power to do so. The Craig Lumber Company itself already having made an election is bound by the same. It can make but one election—it cannot elect to accept the logs and pay for part of them and not pay for the remainder. If the bankrupt could not make a further election, how can the trustee?

As to the first point, therefore, the decision of the referee is upheld. [25]

As to the second point, to wit, whether or not the claim of the McDonald-Weist Company should be considered as a preferred claim: Our logger's lien statute is in derogation of the common law, and must be strictly construed in so far as it attempts to create a lien in favor of persons not in possession of the personal property upon which labor is performed. It is true that being a remedial statute it must be liberally construed so far as to affect the purpose and intent of the legislature. The purpose and intent of the legislature must be gathered from the terms of the act, and it seems to me that the provision creating liens upon logs was intended to benefit persons who performed labor upon logs. I cannot see anything in the statute which even

squints at the idea that contractors who perform no manual labor on or about the logs shall have a lien therefor. The lien is given to the person who does the work so that the fruits of his labor may not be lost by a sale by the party for whom the labor is done. Under said statute any employee of the McDonald-Weist Company would have a lien upon the logs, if his claim was duly filed, but how the McDonald-Weist Logging Company would have a lien upon the logs is not apparent, for it has performed no labor, although some of its stockholders may have done so.

I am cited to the following cases:

Kronback Lumber Co. vs. Williams Bros., 75 S. W. 854 (Ark.), but it seems that that case is an authority against the party who cites it, for the Court there says:

“As to contractors, we have several times held that a contractor is not a laborer within the meaning of the statute giving persons liens who performed work and labor, the statute being intended to protect the actual laborer, and does not apply to contractors or those who only superintended the labor of others.”

It is true that the Court in that case said that the Williams Brothers, the contractors, would have a lien for the *work actually performed* by them, but it also said that “as the evidence does not show the value of this work, we are unable to enter a final decree here.” [26]

Allen vs. Roper, 86 S. W., page 836, does not touch the question here under consideration.

Martin vs. Wakefield, 43 N. W. 966, simply holds that manual labor includes the use of the implements or instrumentalities actually used in and necessary to the performance of such labor, such, for instance, as a team, the Court saying:

“A man and his team are employed on the work at a gross price for both. The fact that the employer may have them work separately the whole or a part of the time can make no difference.”

Breault vs. Archambault, 67 N. W. 346, simply holds that a blacksmith employed at the camp in shoeing horses and repairing sleds and in mending and keeping in order the tools used by the men actually engaged in the common enterprise is also entitled to a lien.

Carver vs. Bagley, 81 N. W. 757, is in favor of the claimant, but the decision is a mere *ipse dixit*. No authorities of any kind are cited, the statute is not given, and as an authority the case is not of a very compelling character.

To the contrary, see 17 R. C. L., sec. 43.

In the cases of Day vs. Green, 127 P. R. 772, and of Schultz vs. Shively, 143 P. R. 1115, cited in support of the lien, the point in question here was not suggested.

The decision of the referee on this point is also upheld.

Filed in the District Court, District of Alaska, First Division. May 9, 1921. J. W. Bell, Clerk. By V. F. Pugh, Deputy. [27]



In the District Court for the District of Alaska,  
Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

No. 2057-A.

In the Matter of THE CRAIG LUMBER CO., a  
Corporation,

Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

McDONALD-WEIST LOGGING CO.,

Respondent.

**Order Affirming Decree of Referee.**

This cause came on duly to be heard before the District Court for Alaska, Honorable Robert W. Jennings presiding, at Juneau, on the 9th day of May, 1921, upon an appeal by the McDonald-Weist Logging Co., a corporation, claimant, from an order and decree of H. B. LeFevre, referee in bankruptcy, allowing the claim of the said McDonald-Weist Logging Co. for \$27,871.50, with interest thereon from December 20, 1918, at eight per cent per annum, as a general claim, but refusing to allow the same as a secured claim upon the proceeds of certain logs and lumber in the hands of the trustee; and upon the appeal by the trustee from the said order and decree of the referee refusing to expunge said claim from the list of claims against the bankrupt; Messrs. Roden & Dawes appearing for the



McDonald-Weist Logging Co., and Mr. J. H. Cobb appearing for the trustee; and the Court having heard the arguments of counsel and duly considered the same,—

IT IS CONSIDERED AND ADJUDGED by the Court that the aforementioned order and decree of H. B. LeFevre, as Referee in Bankruptcy, be and the same is hereby affirmed, and the cause [28] remanded to Referee in Bankruptcy for further proceedings.

Done in open court, at Juneau, Alaska, this the 14th day of May, A. D. 1921.

ROBERT W. JENNINGS,  
Judge.

Filed in the District Court, District of Alaska, First Division. May 14, 1921. J. W. Bell, Clerk.  
By L. E. Spray, Deputy.

Entered Court Journal No. Q, page 278. [29]

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In the District Court of Alaska, Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

No. 2057-A.

In the Matter of THE CRAIG LUMBER CO., a Corporation,

Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

McDONALD-WEIST LOGGING CO.,

Respondent.

### **Assignments of Error.**

Now comes E. L. Cobb, trustee in bankruptcy in the above-entitled and numbered cause, by his attorney, and assigns the following errors committed by the Court on the trial and in the rendition of the judgment and decree of the Court, and upon which he will rely in the Appellate Court:

#### **I.**

The Court erred in ruling and holding that the McDonald-Weist Logging Co., a foreign corporation, could prosecute its claim in the bankruptcy court notwithstanding its failure to comply with the laws of Alaska authorizing foreign corporations to do business in the territory.

#### **II.**

The Court erred in ruling and holding that the defense of a failure to comply with the laws of Alaska governing foreign corporations doing business in the territory could only be interposed in this case by the bankrupt, the other party to the contract, but could not be interposed by the trustee.  
[30]

#### **III.**

The Court erred in sustaining the claim of the McDonald-Weist Logging Co. as a valid claim against the bankrupt and in refusing to expunge said claim from the list of claims against said bankrupt.

And for said errors the trustee prays that the said judgment and decree of the District Court and of the referee be reversed and the cause remanded,

with instructions to expunge said claim from the list of approved claims against the bankrupt; and for such other orders and decree as to the Court may seem proper.

J. H. COBB,  
Attorney for Trustee and Appellate.

Filed in the District Court, District of Alaska,  
First Division. May 14, 1921. J. W. Bell, Clerk.  
By L. E. Spray, Deputy. [31]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

No. 2057-A.

In the Matter of THE CRAIG LUMBER CO., a  
Corporation,

Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

McDONALD-WEIST LOGGING CO.,  
Respondent.

**Petition for Allowance of Appeal and Order  
Allowing Same.**

Now comes E. L. Cobb, trustee in bankruptcy in the above-entitled and numbered cause, by his attorney, and considering himself aggrieved by the order, judgment and decree of the District Court rendered

herein on the 14th day of May, 1921, affirming the judgment of the Referee allowing the claim of the McDonald-Weist Logging Co. as a general claim against the bankrupt estate, and having filed his assignments of error herein, most respectfully prays that the Court will be pleased to allow an appeal from said decree to the Honorable United States Circuit Court of Appeals for the Ninth Circuit.

J. H. COBB,

Attorney for Trustee.

Upon consideration of the above and foregoing petition, IT IS ORDERED that the appeal prayed for be, and the same is hereby, allowed.

Done in open court this the 14th day of May, 1921.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska, First Division. May 14, 1921. J. W. Bell, Clerk.  
By L. E. Spray, Deputy.

Entered Court Journal No. Q, page 278. [32]

In the District Court for the District of Alaska,  
Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

No. 2057-A.

In the Matter of THE CRAIG LUMBER CO., a  
Corporation,

Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

McDONALD-WEIST LOGGING CO.,

Respondent.

**Citation on Appeal.**

The President of the United States of America, to  
the McDonald-Weist Logging Co., a Corporation,  
and to Messrs. Roden & Dawes, Its Attorneys,  
GREETING:

You and each of you are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal from a decree in a cause lately pending in said court between E. L. Cobb, trustee in bankruptcy of the Craig Lumber Co., a corporation, bankrupt, and you as a claimant against said bankrupt, then and there to show cause, if any there be, why the decree mentioned in said



order should not be reversed and speedy justice done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this the 14th day of May, 1921, and of the Independence of the United States the one hundred forty-fourth.

ROBERT W. JENNINGS,

Judge.

Attest: J. W. BELL,

Clerk.

Service of the above and foregoing citation admitted this the 14th day of May, 1921.

RODEN & DAWES,

Attorneys for McDonald-Weist Logging Co.

Filed in the District Court, District of Alaska, First Division. May 14, 1921. J. W. Bell, Clerk.  
By L. B. Spray, Deputy. [33]

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In the District Court for Alaska, Division No. 1, at  
Juneau.

IN BANKRUPTCY—No. 31.

In the Matter of THE CRAIG LUMBER CO., a  
Corporation,

E. L. COBB, Trustee,

Bankrupt,

Appellant,

vs.

McDONALD-WEIST LOGGING CO., a Corpora-  
tion,

Appellee.

**Praeceptum for Transcript of Record.**

To the Clerk:

You will please make up a transcript of the record in the above cause, and include therein the following papers, to wit:

1. Claim of the McDonald-Weist Logging Co. filed May 27th, 1919.
2. Objections of the trustee to said claim filed August 18th, 1919.
3. Decision of the Referee, dated December 28th, 1920.
4. Order allowing claim, dated December 30th, 1920.
5. Stipulation, filed December 15th, 1919.
6. Petition of trustee for review, filed Dec. 31, 1920.
7. Certificate of referee, filed December 31, 1920.
8. Decision of the District Court.
9. Order affirming decree of the referee.
10. Assignments of error.
11. Petition for appeal, and order allowing same.
12. Citation on appeal.
13. Clerk's certificate.
14. This praecipe.

Said transcript to be made up in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and of this court.

J. H. COBB,

Attorney Appellant.

Filed in the District Court, District of Alaska, First Division. May 18, 1921. J. W. Bell, Clerk.  
By L. E. Spray, Deputy. [34]

In the District Court for the District of Alaska,  
Division No. 1, at Juneau.

**Certificate of Clerk U. S. District Court to Transcript  
of Record.**

United States of America,  
District of Alaska,  
Division No. 1,—ss.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached thirty-four pages of typewritten matter, numbered from one to 34, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record, prepared in accordance with the praecipe of the attorney for petitioner and appellant on file in my office and made a part hereof, in Cause No. 31—In Bankruptcy, No. 2057—A, wherein Craig Lumber Co., a corporation, Bankrupt, E. L. Cobb, Trustee, is petitioner and appellant, and McDonald-Wiest Logging Co. is respondent and appellee.

I further certify, that the said record is by virtue of the petition on appeal and citation issued in this cause and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to fifteen and 30/100 dollars (\$15.30), has been paid to me by counsel for appellant.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this twenty-seventh day of May, 1921.

[Seal]

J. W. BELL,  
Clerk.

By L. E. Spray,  
Deputy. [35]

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[Endorsed]: No. 3699. United States Circuit Court of Appeals for the Ninth Circuit. E. L. Cobb, as Trustee in Bankruptcy of the Craig Lumber Company, a Corporation, Bankrupt, Appellant, vs. McDonald-Weist Logging Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed June 9, 1921.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.





No. 3699

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**In the United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

---

E. L. COBB as Trustee for the Craig Lumber Co.,  
a corporation, Bankrupt, Appellant,

vs.

McDONALD-WEIST LOGGING CO., a corporation  
Appellee.

No. 3704

McDONALD-WEIST LOGGING CO., a corporation  
Appellant,

vs.

E. L. COBB as Trustee for the Craig Lumber Co.,  
a corporation, Bankrupt, Appellee.

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UPON APPEALS FROM THE DISTRICT COURT  
FOR ALASKA, DIVISION NUMBER ONE.

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BRIEF FOR E. L. COBB AS TRUSTEE, Etc.,  
Appellant in No. 3699 and Appellee in No. 3704

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J. H. COBB,  
Solicitor for E. L. Cobb,  
as Trustee, etc.



## STATEMENT OF THE CASE

The appellee and the Craig Lumber Company, are both corporations of the State of Washington. In January 1918, the two corporations made and entered into a contract in the Territory of Alaska, whereby the appellee was to cut and deliver logs in Alaska to the Lumber Company, and the Lumber Company was to pay therefor \$10.00 per thousand feet board measure. Under this contract the appellee cut and delivered 3,779,426 feet of logs. In March 1919, the Craig Lumber Company was adjudged a bankrupt. On May 22nd, 1919 the appellee presented a claim for \$27,871.50 with interest, for an alleged balance due on the contract, and also claimed a loggers' lien on certain logs and lumber in the hands of the Trustee.

Both the claim and the lien were contested by the Trustee, the former on the ground that the contract was void because of the failure of the McDonald-Weist Logging Company to comply with the laws of Alaska authorizing it to do business or make contracts in the Territory: and the latter upon the ground (even if the contract were binding and the claim good) that the Loggers' Lien Statute, (Compiled Laws of Alaska, section 709), did not give Liens to contractors, but only to laborers. The Referee sustained the Trustee's objection to the claim, not passing upon the objection to the lien as such, as

it became immaterial. From this decision the appellee appealed to the District Judge, who reversed the ruling of the Referee and remanded the case for further proceedings before the Referee. The Trustee thereupon petitioned this Court for a review of the ruling of the District Judge. The petition for review was dismissed for want of jurisdiction.

Cobb vs. McDonald-Weist Company, 269 Fed. 755.

Upon the coming down of the mandate, the Referee in deference to the decision of the District Judge, allowed the claim, but denied the lien. From this ruling both parties appealed. The decision of the Referee was affirmed by the Judge, and both parties have appealed to this court.

The McDonald-Weist Company complains of the decision of the Court in so far as it disallowed their claim of a loggers lien.

The Trustee complains of the decision in allowing the claim at all in the following:

## ASSIGNMENT OF ERRORS

### 1.

The Court erred in ruling and holding that the McDonald-Weist Logging Company, a foreign corporation could prosecute its claim in the bankruptcy court notwithstanding its failure to comply with the laws of Alaska authorizing foreign corporations to do business in the territory.

### II.

The Court erred in ruling and holding that the defense of the failure to comply with the laws of Alaska governing foreign corporations doing business

in the territory could be interposed in this case by the bankrupt, the other party to the contract, but could not be interposed by the Trustee.

### III.

The Court erred in sustaining the claim of the McDonald-Weist Logging Company, as a valid claim against the bankrupt and in refusing to expunge said claim from the list of claims against said bankrupt.

These assignments raise the single question: Can a foreign corporation doing business and contracting in Alaska without having first complied with the local law authorizing it to do business, enforce a claim in bankruptcy growing out of such business?

A stipulation as to the facts, which was made the basis of the Court's findings on that issue (Rec. 8-10) was filed, and shows the following facts:

#### I.

The McDonald-Weist Company is a corporation of the State of Washington.

#### II.

The contract upon which the claim in controversy is based, and out of which it grows, was made in the Territory of Alaska on the 2nd day of January, 1918, and was to be performed entirely within the Territory of Alaska.

#### III.

On December 12th, 1917, the McDonald-Weist Company filed in the office of the clerk of the District Court for the First Division, the following



papers, and no others to-wit:

(a) A certified copy of its Charter or Articles of Incorporation.

(b) Its written consent to be sued, and the appointment of L. J. MacDonald as its agent.

(c) A document attached to document (b) filled out in the handwriting of L. J. MacDonald which was, in form, an acceptance of the appointment, but the same was never subscribed by the said L. J. MacDonald.

#### IV.

The MacDonald Weist Company filed in the office of the Secretary of the Territory of Alaska the following documents and no others, at the dates mentioned, to wit: (18)

(a) Charter filed January 28th, 1918.

(b) Appointment of agent and acceptance of appointment filed January 28th, 1918.

(c) Annual statement filed February 16th, 1918.

(d) Annual statement filed February 27th, 1919.

#### V.

The Annual Statement filed February 16th, 1918, was not verified by the President and Secretary of the MacDonald-Weist Company, nor attested by the directors, and the Annual Statement filed February 27th, 1919, was not attested by a majority of the directors.

The statutes of Alaska bearing upon the subject are Compiled Laws of Alaska, Section 654, 655, 657, 658, (as amended by Chapter 20, Session Laws of Alaska 1917) and 660, which read as follows:

“Section 654. All corporations or joint stock com-

panies organized under the laws of the United States, or the laws of any state or territory of the United States shall, before doing business within the District, file in the office of the Secretary of the District and in the office of the Clerk of the District for the division wherein they intend to carry on business, a duly authenticated copy of their charter or articles of incorporation, and also a statement verified by the oath of the president and secretary of such corporation, and attested by a majority of its board of directors, showing—

“(1) The name of such corporation and the location of its principal office or place of business without the district: and, if it is to have any place of business or principal office within the district, the location thereof;

“(2) The amount of capital stock;

“(3) The amount of its capital stock actually paid in money;

“(4) The amount of its capital stock paid in any other way, and in what;

“(5) The amount of the assets of the corporation and of what the assets consist, with the actual cash value thereof;

“(6) The liabilities of such corporation, and if any of its indebtedness is secured, how secured, and upon what property.

“Such corporation or joint company shall also file at the same time, and in the same office, a certificate, under seal of the corporation and the signature of its president, vice-president, or other acting head, and its secretary, if there be one, certifying that the corporation has consented to be sued in the courts of the district upon all causes of actions

arising against it in the district, and that the service of process may be made upon some person, a resident of the district, whose name and place of residence shall be designated in such certificate, and such service, when so made upon such agent, shall be valid service on the corporation or company, and such agent shall reside at the place of business of such corporation or company in the district."

"Sec. 655. The written consent of the person so designated to act as such agent shall be filed in like manner, and such designation shall remain in force until the filing in the same office of a written revocation thereof, or of the consent, executed in like manner. A certified copy of the designation so filed accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it."

"Sec. 657. If any such corporation or company shall attempt or commence to do business in the district without having first filed said statements, certificates, and consents required by this chapter, it shall forfeit the sum of twenty-five dollars for every day it shall so neglect to file the same; and every contract made by such corporation, or any agent or agents thereof, during the time it shall so neglect to file such statements, certificates, or consents, shall be voidable at the election of the other party thereto. It shall be the duty of the United States attorney for the district to sue for and recover, in the manner of the United States, the penalty above provided, and the same, when so recovered shall be paid into the Treasury of the United States."

"Sec. 658. Every foreign corporation or company

shall annually and within sixty days (60) from the first day of January each year make a report, which shall be in the same form and contain the same information as required in the statement mentioned in Section Six Hundred and fifty-four, Chapter twenty-three of the Compiled Laws of the Territory of Alaska, which report shall be filed in the office of the Secretary of the Territory of Alaska, and a duplicate thereof in the office of the clerk of the District Court for the division of the Territory wherein the business of the corporation is carried on."

"Sec. 660. If any such corporation or company shall fail to comply with any of the provisions of this chapter, all its contracts with citizens of the district shall be void as to the corporation or company, and no court of the district or of the United States, shall enforce the same in favor of the corporation or company so failing."

It will thus be seen that while the McDonald-Weist Company had apparently intended to comply with the law, and taken some steps in that direction, it had wholly failed to do so, in this:

1st In the Secretary's office,

- (a) It failed to file articles of incorporation before making the contract.
- (b) It failed to file its appointment of agent and his acceptance before the contract was made.
- (c) The annual statements filed were not in compliance with the law and were in effect no statements.

2nd. In the Clerks office the company failed to



comply with the law in the following:

- (a) It filed no acceptance of agency.
- (b) It filed no annual statement at all at the time, and during the period the contract was entered into, and was being performed.

A claim against a bankrupt estate, in favor of a foreign corporation, growing out of business done by it, without having first complied with the laws is void and not a provable claim in Bankruptcy.

1. Loveland on Bankruptcy 636.

Brandenburg on Bankruptcy Sec. 522.

In re Montello Brick Works, 163 Fed. 621, Affirmed 172 Fed. 311. S. C. 174 Fed. 498.

Buffalo Ref. Mchn. Co., vs. Penn. H. & P. Co. 178 Fed. 696.

La Moine L. & T. Co., vs. Kesterson, 171 Fed. 980.

Pittsburg Con. Co., vs. W. S. B. Ry. Co. 154 Fed. 929, 11 L. R. A. (N. S.) 1145.

Tri-State Am. Co., vs. Forest Park, Etc. Co. 90, S. W. Rep. 1020."

These authorities, it seems to us, settle the question in favor of the appellant.

The learned trial Judge, however, while admitting in his opinion (Rec. 28) that the appellee had only "made an abortive effort to comply with the laws of the Territory," held in effect that the Section of the statute quoted above did not affect the matter in controversy "for the reason that the Craig Lumber Company was not a citizen of the Territory." This we think, is entirely a too narrow and technical view of the sense in which the term "citizen" is used in the statutes. It is said in the 11th Corpus Juris, page 774, "While the word citizen is capable of more



meanings than one, it is not a convertible term with 'inhabitant' or 'resident,' although it is often used synonymously with such terms without any implication of political or civil privileges. It may indicate a permanent resident, or one who remains for a time, or from time to time. The word must always be taken in the sense which best harmonizes with the subject matter in which it is used." Of course, there is in the United States, a dual citizenship in that there are citizens of the States and citizens of the United States, and one may be a citizen of the United States without being a citizen of any state, or he may be a citizen of a state without being a citizen of the United States. In that sense, there are no citizens of a Territory, and in the statute in question, the narrow meaning indicated in the opinion of the trial Judge, would render the Section quoted, meaningless and void. To use the word in the sense which best harmonizes with the subject matter, it is clear what Congress had in mind, where those individuals, corporations or associations legally domiciled in the territory, and legally doing business and making contracts therein. It was these that Congress was protecting against suits by outlaw corporations, and the word citizen as used in the statute, was used in this sense, and not in the sense of an individual having political rights. Any other construction would place all corporations, although organized in the territory and all the stockholders of which were citizens of the United States and residents of the territory under a different law than the same citizens would be, doing business as individuals. This surely was not the intent of Congress.

We think therefore, that the construction given of Section 660, by the learned trial Judge, was entirely too narrow and technical, and ignored the whole subject matter and purpose of the statute.

The learned trial Judge further held, that the Trustee could not raise the question at all, because the statutes provided that all such contracts are to be voidable at the election of the other party. That is, the Court held in effect, that the Craig Lumber Company could have invalidated the contract, but the Trustee could not, and further held, that the Craig Lumber Company had elected to abide by it.

Both these contentions are erroneous. If one is precluded by election from objecting to a suit by an outlaw corporation, the whole purpose of the statute is avoided, for any person entering into such a contract makes his election then, and if the Court's reasoning is correct, he could never thereafter object to it.

The holding of the Court that the Trustee could not interpose an objection to the claim because the claimant had not complied with the law, overlooks the powers and duties of a Trustee in Bankruptcy. He may make any objections to claims that the Bankrupt can make

Brandenburg on Bankruptcy Sec. 653,  
Atkins vs. Wilcox 105 Fed. 595.

He takes all the rights and titles of the Bankrupt, as well as any rights of the creditors against adverse claimants to the estate.

Brandenburg on Bankruptcy Sec. 724.

Besides, under the plain provision of Section 660,

Comp. Laws of Alaska, it was the plain duty of the Court, to expunge the claim of the McDonald-Weist Logging Company, upon its own motion upon the facts being made known.

Upon the second point raised in the appeal of the McDonald-Weist Logging Company, by their contention that they had a loggers lien to secure their claim, we content ourselves with citing the opinion of the trial Court, Page 34 and 35, in the record, and the authorities there cited.

We respectfully ask that the order of the District Court be reversed and the cause be remanded with instructions to the Court below, to expunge the claim of the appellee.

J. H. COBB,  
Attorney for E. L. Cobb as Trustee, etc.



16

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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E. L. COBB, as Trustee in Bankruptcy of the  
CRAIG LUMBER COMPANY, a Corporation,  
Bankrupt,

Appellant,

VS.

McDONALD-WEIST LOGGING COMPANY, a  
Corporation,

Appellee.

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**BRIEF OF APPELLEE**

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Upon Appeal from the United States District Court  
for the District of Alaska, Division No. 1.

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RODEN & DAWES,

Attorneys for Appellee.

FILED  
OCT 11 1911

F. D. MOWATSON





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

---

E. L. COBB, as Trustee in Bankruptcy of the  
CRAIG LUMBER COMPANY, a Corporation,  
Bankrupt,

Appellant,

VS.

McDONALD-WEIST LOGGING COMPANY, a  
Corporation,

Appellee.

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**BRIEF OF APPELLEE**

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Upon the Craig Lumber Company being declared a bankrupt, the MacDonald Weist Logging Company filed its claim for services in getting out logs under a contract and also asked to be preferred by reason of a lien claim filed by it. The Referee in Bankruptcy entered an order allowing the claim but denying the lien and both the Trustee and claimant asked for a review and both appealed from an order of the District Court affirming the order of

the Referee. Separate transcripts have been made. The Trustee has briefed the cases together and the claimant, MacDonald Weist Logging Company, appellee herein and appellant in No. 3704, files a brief in each case.

## BRIEF OF APPELLEE

Case No. 3699

Appellant seeks to reverse an order of the District Court affirming an order of the Referee in Bankruptcy allowing the claim of the appellee herein. Appellant urges that the claim of appellee is based upon a void contract and cannot be enforced. The appellee contends:

First.—That the appellant (Trustees in Bankruptcy) has lost his right to appeal from the order allowing the claim, and

Second.—That in any event, the claim is based upon a valid contract and should be allowed.

### *1st.—Time for Appeal Passed.*

Upon consideration of the claim in the first instance, the Referee disallowed same and the District Court, upon review, reversed the Referee. The Trustee (appellant herein) petitioned this Court for a review (Case No. 3468 of this Court) of the ruling of the District Court and in an opinion reported in 266 Fed. at page 692, by Mr. Justice Hunt, held that the Trustee's remedy by appeal was exclusive and the time for appeal having passed, the petition was dismissed.

While the question was not decided on the merits, yet it was none the less conclusive upon the Trustee and the order of the District Court allowing the claim was final and cannot now be appealed from, the time allowed (10) days having expired.

*2nd.—Claim Should Be Allowed on the Merits.*

While we believe that the above is conclusive of this appeal, we also urge that the claim should be allowed on the merits.

The trustee seeks to avoid payment for services rendered the bankrupt under the contract by reason of Sections 654-660 inclusive, of the Compiled Laws of Alaska relating to the qualification of foreign corporations to do business in the Territory. Both the parties (the bankrupt and the claimant) are corporations of the State of Washington and were doing business in Alaska when the contract out of which this controversy arose was made and the services of claimant rendered.

The controlling sections of the Compiled Laws of Alaska are as follows:

“Section 654. All corporations or joint stock companies organized under the laws of the United States, or the laws of any state or territory of the United States, shall, before doing business within the District, file in the office of the Secretary of the District and in the office of the Clerk of the District Court for the division wherein they intend to carry on business, a duly authenticated copy of their char-

ter or articles of incorporation, and also a statement verified by the oath of the president and secretary of such corporation, and attested by a majority of its board of directors, showing—

“(1) The name of such corporation and the location of its principal office or place of business without the district; and, if it is to have any place of business or principal office within the district, the location thereof;

“(2) The amount of capital stock;

“(3) The amount of its capital stock actually paid in money;

“(4) The amount of its capital stock paid in any other way, and in what;

“(5) The amount of the assets of the corporation, and of what the assets consist, with the actual cash value thereof;

“(6) The liabilities of such corporation, and if any of its indebtedness is secured, how secured, and upon what property.

“Such corporation or joint stock company shall also file, at the same time and in the same offices, a certificate, under the seal of the corporation and the signature of its president, vice-president, or other acting head, and its secretary, if there be one, certifying that the corporation has consented to be sued in the courts of the district upon all causes of actions arising against it in the district, and that service of process may be made upon some person, a resident



of the district, whose name and place of residence shall be designated in such certificate, and such service, when so made upon such agent, shall be valid service on the corporation or company, and such agent shall reside at the principal place of business of such corporation or company in the district."

"Sec. 655. The written consent of the person so designated to act as such agent shall also be filed in like manner, and such designation shall remain in force until the filing in the same offices of a written revocation thereof, or of the consent, executed in like manner. A certified copy of the designation so filed, accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it."

"Sec. 657. If any such corporation or company shall attempt or commence to do business in the district without having first filed said statements, certificates, and consents required by this chapter, it shall forfeit the sum of twenty-five dollars for every day it shall so neglect to file the same; *and every contract made by such corporation, or any agent or agents thereof, during the time it shall so neglect to file such statements, certificates, or consents, shall be voidable at the election of the other party thereto.* It shall be the duty of the United States Attorney for the District to sue for and recover, in the name of the United States,

the penalty above provided, and the same, when so recovered, shall be paid into the Treasury of the United States."

"Section 658. Every such foreign corporation or company shall annually and within sixty days (60), from the first day of January of each year make a report, which shall be in the same form and contain the same information as required in the statement mentioned in Section Six Hundred and Fifty-Four, Chapter Twenty-Three of the Compiled Laws of the Territory of Alaska, which report shall be filed in the office of the Secretary of the Territory of Alaska, and a duplicate thereof in the office of the Clerk of the District Court for the division of the Territory wherein the business of the corporation is carried on."

"Sec. 660. If any such corporation or company shall fail to comply with any of the provisions of this chapter, *all its contracts with citizens of the district shall be void as to the corporation or company*, and no court of the district, or of the United States, shall enforce the same in favor of the corporation or company so failing."

The contention of appellee is that it made a bona fide effort to comply with the statutes and that its acts in that behalf were a substantial compliance. Further—that if the acts of appellee are held to be a non-compliance, yet the contract it made with the bankrupt was not void but voidable at most and the other party thereto, after receiving

the benefits of appellee's services, cannot repudiate the same and avoid payment as per its terms.

The contracting parties were both foreign corporations, and, as stated by the District Judge in his opinion (Rec. p. 30) the section of the statute under consideration (660) only makes void contracts between non-complying foreign corporations and "*citizens of the district*"—that is, with citizens of the District of Alaska.

That is not a new or narrow construction of such a provision. It is the intent of the legislature plainly stated.

"Sometimes the statute applies in terms to contracts of a foreign corporation *with citizens only*, and does not render void or unenforceable contracts between foreign corporations and persons who are not citizens of the state." 19 Cyc. 1291.

The Statute of Arkansas provides in part:

"If such corporation shall fail to file such certificate, all its contracts *with citizens of this state* shall be void as to it and shall not be enforced in its favor by the courts."

And upon a question presented to the Supreme Court of that State it was held:

"The sole object of the act as shown by these provisions, is the protection of the citizen. The contracts affected by it are made with him, and, if entered into in violation of the statute, are void as to the corporation, and no one else. Contracts between foreign corporations and persons who are not citizens are under no circumstances declared void as to any one."

*St. L. A. & T. R. Co. vs. Fire Assn. of Philadelphia*, 60 Ark. 325; 30 S. W. 350; 28 L. R. A. 83.

Section 657 of the Compiled Laws of Alaska provides that failure to file the required documents shall make voidable all contracts made by the defaulting corporation with any party, at the option of such party. It follows then that, at most, the logging contract made between the two Washington corporations was voidable at the election of the bankrupt corporation.

This brings us to the consideration of the point raised by the trustee that he takes any and all rights of the bankrupt and could elect not to be bound by the contract under consideration.

The voiding of a voidable contract is rescission.

“A party, to accomplish an adverse rescission must return to the non-consenting party what will place him in statu quo. The party rescinding must return the consideration or whatever else he received under the contract, and otherwise do what will put him and the other party in statu quo, as already explained; and if he cannot do this—as, if he has derived from the contract some benefit not of a sort to be refunded—he cannot rescind.” Bishop on Contracts. Sections 818-833.

rupt, cannot now say—“I have received the logs cut under the contract and sawed most of them into lumber, much of which I have sold and pocketed the proceeds therefrom. The contract is voidable and I now elect to avoid it. I cannot return the



services you rendered nor the 4,000,000 feet of logs and I do not have to even pay you the price of the services because your claim, upon my election to hold the contract void, is not provable in bankruptcy." The mere statement of the proposition refutes its correctness.

Counsel for the trustee in his brief cites two texts, Brandenburg and Loveland, on Bankruptcy. Both citations treat of the subject of *illegal contracts*. There is no denying that a claim cannot be founded upon an illegal contract. The following language from Loveland (p. 636) is the only seemingly pertinent paragraph in the citations mentioned:

"Where a foreign corporation is "doing business *in Pennsylvania*, it can not prove claims upon contracts unless it has complied with the statute with respect to registration."

By putting emphasis on the words "in Pennsylvania" we see that it is not a general principle of law that Loveland has recorded. On turning to the Pennsylvania statute the paragraph is readily understood.

"It shall not be lawful for any corporation to do any business in this commonwealth, until it shall have filed in the office of the Secretary of the commonwealth \* \*"

The same is true of the cases cited by counsel for the Trustee. Two of them (*In re Montello Brick Works*, 163 Fed. 621 and *Buffalo Ref. Mach. Co., vs. Penn. H. & P. Co.*, 178 Fed. 696) depend



upon the Pennsylvania statute above referred to and two are based upon the Oregon and Missouri Statutes which are, in effect, very similar.

Oregon.—“ \* in default thereof (filing declaration etc.) it (the non-complying foreign corporation) shall not be entitled to transact any business within this state or maintain any suit, action, or proceeding in its courts.” (*La Moine L. & T. Co. vs. Kesterson*, 171 Fed. 980.)

Missouri.—“In addition to which, (fine of \$1000.00) on or after the going into effect of this act, no foreign corporation as above defined, which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out of contract or tort;” (*Tri-State Amusement Co. vs. Forest Park H. A. Co.*, 90 S. W. 1020.)

This, we believe, disposes of appellant's contention. It would seem clear:—

First.—That the failure of the trustee to appeal within the time allowed by law from the order of the District Court reversing the order of the Referee disallowing the claim of the appellee herein, is conclusive of this appeal.

Second.—That on the merits the appellee's claim should be allowed, as, based upon a contract not with a citizen of the District, it was not void but voidable, at most, and the trustee, from the nature of the contract, cannot now elect to avoid the same because he cannot place the parties in statu quo.

For these reasons we respectfully urge this honorable Court to affirm the order of the District Court affirming the order of the Referee in Bankruptcy allowing appellee's claim.

Respectfully submitted,

RODEN & DAWES,

Attorneys for Appellee.



United States  
17  
Circuit Court of Appeals  
For the Ninth Circuit.

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HEATH UNIT TILE COMPANY, a Corporation,  
Appellant,

vs.

AMERICAN FIRE BRICK COMPANY, a Corporation, and RICHEY & GILBERT COMPANY, a Corporation,  
Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court  
for the Eastern District of Washington,  
Northern Division.

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FILED  
AUG 17 1921  
F. D. MONKTON,  
CLERK





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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HEATH UNIT TILE COMPANY, a Corporation,  
Appellant,  
vs.

AMERICAN FIRE BRICK COMPANY, a Corporation, and RICHEY & GILBERT COMPANY, a Corporation,  
Appellees.

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**Transcript of Record.**

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Upon Appeal from the United States District Court  
for the Eastern District of Washington,  
Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## **Names and Addresses of Solicitors of Record.**

### **Solicitors for Plaintiff:**

L. L. WESTFALL, 912 Paulson Bldg., Spokane,  
Washington.

JUSTIN W. MACKLIN, 1028 Society for Sav-  
ings Bldg., Cleveland, Ohio.

### **Solicitors for Defendant:**

M. E. MACK, 305 Empire State Bldg., Spokane,  
Washington. [1\*]

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In the District Court of the United States, Eastern  
District of Washington, Northern Division.

IN EQUITY—No. 3390.

HEATH UNIT TILE COMPANY,

Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY and  
RICHEY & GILBERT COMPANY,

Defendants.

### **Bill of Complaint.**

To the Honorable Judges of the District Court of  
the United States, in and for the Northern Di-  
vision of the Eastern District of Washington.

HEATH UNIT TILE COMPANY, a corporation  
organized and existing under by virtue of the laws  
of the State of Washington, having its principal  
office for the transaction of business in the city of

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\*Page-number appearing at foot of page of original certified Transcript  
of Record.

Tacoma, Pierce County, Washington, and a citizen of said State, brings this, its bill of complaint against American Fire Brick Company, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, having its general office and a regular and established place of business in the city of Spokane, Spokane County, Washington, and a citizen of said State, and against Richey & Gilbert Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, having its principal office and a regular and established place of business at North Yakima, in the County of Yakima, in the State of Washington, and a citizen of said State, and thereupon, your orator complains and says that:

1. This is a suit brought under the patent laws of the United States for the infringement of a United States patent, wherein the jurisdiction of the Court depends upon the subject matter.

2. Prior to July 7, 1913, Frederick Heath of Tacoma, [2] Washington, was the original, first, and sole inventor of certain new and useful improvements in Hollow Wall Constructions which were not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not patented in any country foreign to the United States on an application filed more than twelve months prior to his application for letters patent of the United States therefor, and not in public use or on sale in this country for more than

two years prior to such application, and not patented or caused to be patented by him or his legal representatives or assigns in any foreign country on an application filed prior to the filing of his application for letters patent of the United States, and which had not been abandoned to the public. On the 7th day of July, 1913, said Frederick Heath duly filed in the United States Patent Office an application for letters patent covering said invention or discovery, whereupon such proceedings were had in accordance with the provisions of the law; that on the 6th day of February, 1917, letters patent of the United States, No. 1,215,149, were duly issued on the said application to said Frederick Heath, which letters patent with its specification was recorded in books kept for that purpose in the United States Patent Office, whereby said Frederick Heath, his legal representatives and assigns, were granted the exclusive right to make, use and sell said invention or improvements for a term of 17 years from the 6th day of February, 1917, throughout the United States and the territories thereof, all as by the original grant of said letters patent or a duly authenticated copy thereof here in court produced, will more fully appear. A copy of said letters patent is hereunto annexed and marked Plaintiff's Exhibit No. 1."

3. Plaintiff having derived title to said letters patent by an assignment in writing from said Frederick Heath, executed on [3] the 10th day of February, 1917, and thereafter duly recorded in the United States Patent Office, has since that date continuously remained and now is, the sole and exclusive

owner of said letters patent and all rights and privileges thereunder.

4. Defendant, American Fire Brick Company, was formerly a licensee under said letters patent No. 1,214,149 by virtue of a license agreement from plaintiff, executed on the 24th day of December, 1917, and manufactured and sold for use hollow building tile under the authority of said letters patent and paid to plaintiff royalty on the hollow building tile, thus made and sold, all in accordance and compliance with the provisions of said license agreement dated December 24, 1917, until the month of July, 1919, when said American Fire Brick Company failed to make its semi-annual report of the number of tile made and sold, and failed to make payment to plaintiff of the royalties then due. The attention of defendant, American Fire Brick Company, was called by your orator to its failure to make its semi-annual report and royalty payment under the terms of said license agreement, whereupon said defendant, American Fire Brick Company, notified your orator on August 18, 1919, that it "refused to proceed further under said contract." Your orator thereupon on August 28, 1919, notified defendant, American Fire Brick Company, that the license agreement of December 24, 1917, was forfeited and cancelled and warned said American Fire Brick Company against further manufacture or sale of tile in infringement of said letters patent No. 1,215,149.

5. Defendant, American Fire Brick Company has, subsequent to its last royalty payment in January, 1919, under said license agreement of December



24, 1917, and subsequent to the cancellation of said license agreement, infringed upon said letters patent No. 1,215,149, by making and selling within the Eastern District of Washington and elsewhere in the United States, hollow tile for wall construction, embodying the invention described and [4] claimed in said letters patent, and by inducing others, including defendant Richey & Gilbert Company, to purchase said tile and build hollow wall constructions in violation of your orator's rights under said letters patent, and by manufacturing, advertising, offering for sale and selling to defendant Richey & Gilbert Company as well as to others, hollow tile designed and adapted only for use in hollow wall constructions covered by the aforesaid letters patent and with full knowledge and intent that such tile were to be employed in hollow wall constructions, covered by said letters patent, all without license or authority from your orator and in infringement of said letters patent, and in derogation of your orator's rights thereunder and, despite notices from your orator to desist, this defendant, American Fire Brick Company, continues and threatens to continue so to infringe the aforesaid letters patent, whereby said defendant has profited and plaintiff has been damaged.

6. Defendant, Richey & Gilbert Company has, subsequent to the cancellation of said license agreement of December 24, 1917, between plaintiff and said American Fire Brick Company, purchased hollow tile manufactured by said American Fire Brick Company subsequent to the cancellation of said li-

cense agreement of December 24, 1917, and in violation of said letters patent, and has infringed said letters patent No. 1,215,149 by constructing and using within the Eastern District of Washington and elsewhere in the United States, hollow wall constructions embodying the invention described and claimed in said letters patent, and continues so to infringe, whereby defendant Richey & Gilbert Company has profited and plaintiff has been damaged.

7. Plaintiff is informed and believes that defendant, Richey & Gilbert Company, has on hand hollow building tile which was manufactured by said American Fire Brick Company in violation of said letters patent subsequent to the cancellation of the aforesaid [5] license agreement, and that said Richey & Gilbert Company threatens to employ such tile in the further construction of hollow wall constructions in violation of your orator's rights under the aforesaid letters patent, and despite notices of your orator to said defendant, Richey & Gilbert Company, of its infringement of said letters patent.

8. The unlawful acts of these defendants, consisting in the manufacture and sale by defendant, American Fire Brick Company, to defendant, Richey & Gilbert Company, of hollow building tile designed and adapted for use only in the construction of hollow wall structures covered by said letters patent and the purchase of such tile by defendant, Richey & Gilbert Company, and the employment thereof in the construction and use of hollow wall structures covered by said letters patent constitute a joint infringement by said defendants of the aforesaid let-

ters patent No. 1,215,149. The infringing acts of these defendants have both jointly and severally all been without license or authority from your orator, and despite notices of your orator's rights in the premises. Great and irreparable damage has resulted to plaintiff from the infringing acts of these defendants and each of them, and great gains and profits have accrued to said defendants therefrom, which in equity belong to your orator and should be accounted for by said defendants and paid over to your orator.

9. The public generally has acquiesced in the validity of said letters patent No. 1,215,149 and in your orator's rights in the premises. The invention covered by said letters patent has attained great commercial success and prestige and has supplanted and superseded to a large extent other forms of wall constructions previously employed for similar purposes. A large number of licenses have been granted by your orator under said letters patent, to manufacture, use and sell hollow tile for the construction of hollow walls disclosed in and covered by said letters patent and [6] large sums of money have been and are being paid to your orator by its licensees under said letters patent for the privilege of manufacturing tile to be used in building wall constructions covered by said letters patent.

10. Since the issuance of said letters patent, your orator and its licensees under said letters patent have marked all hollow building tile manufactured under said letters patent with the word "Patented" together with the date of issuance of

said letters patent, as required by the statute in such case made and provided. Your orator and its licensees have manufactured and sold large numbers of building tile under said letters patent throughout various parts of the United States, including the Eastern District of Washington, and have expended large sums of money and been to great trouble and expense in introducing and popularizing the same and the said letters patent are of great value to your orator in its business, and hereafter will be of great and increasing value to it in case it is protected in the exclusive enjoyment thereof, as it verily believes that in law and equity it is entitled to be.

11. Your orator has no adequate remedy save in a court of equity and by the writ of injunction. To the end, therefore, that said defendants, American Fire Brick Company and Richey & Gilbert Company, may, if they can, show reason why your orator should not have relief, may it please your Honor to bring said defendants and each of them to this court by process of subpoena, there to make full, true, direct and perfect answer to the several matters and things herein set forth and charged (though not under oath, answer under oath being hereby expressly waived), and that they be decreed to account for and pay over to your orator the income and profits thus unlawfully derived, or which might and otherwise would have accrued to your orator but for the unlawful and unauthorized acts of said defendants and each of them, together with such increase over the actual damages suffered as is warranted by law, and as may seem just and



proper, and that these defendants and each [7] of them be required to produce their full records and accounts of all kinds, touching upon and concerning their unauthorized and unlawful acts, for the guidance of the Court in determining the amount justly due to your orator in consequence thereof, and further that these defendants, and each of them, may be restrained from any further violation of your orator's rights in the premises, may it release your Honor to grant a writ of injunction issuing from and under the seal of this Honorable Court, perpetually enjoining and restraining said defendants and each of them, their officers, employees, attorneys, agents and representatives of every kind and grade from further manufacture, use or sale in any manner, or attempts thereat, or offers, negotiations or encouragement there-towards, in violation of your orator's rights as aforesaid, and for the further protection of its rights, your orator prays that an injunction *pendente lite* be issued, restraining said defendants and each of them, their officers, employees, attorneys and agents from any further infringement of said letters patent, pending this cause, and it further prays for such other and further relief as the equities of the case may require and to your Honor may seem meet.

HEATH UNIT TILE COMPANY.

By FREDERICK HEATH,  
President.

L. D. WESTFALL,  
Solicitor for Plaintiff.

IRA J. WILSON,  
Counsel for Plaintiff.



State of Washington,  
County of Spokane,—ss.

Frederick Heath, being duly sworn, deposes and says that he is the president of the plaintiff, Heath Unit Tile Company, that he has read the bill of complaint and knows the contents thereof, [8] and that the facts therein stated are true except as to such facts stated upon information and belief, and as to these facts he believes them to be true.

FREDERICK HEATH.

Subscribed and sworn to before me, a notary public, this 5th day of April, 1920.

[Seal]

J. J. SCHIFFNER,

Notary Public.

Filed in the U. S. District Court, Eastern District of Washington, April 5, 1920. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [9]

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In the District Court of the United States for the  
Eastern District of Washington, Northern Division.

No. 3390.

HEATH UNIT TILE COMPANY,

Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY and  
RICHEY & GILBERT COMPANY,

Defendants.

**Answer of American Fire Brick Company.**

Comes now the American Fire Brick Company and answering the bill of complaint, alleges:

I.

That it denies each and every allegation, matter and thing contained in paragraph 1, 2, 3, 5, 6, 7, 8, 9, 10 and 11.

II.

That it admits paragraph 4.

III.

Denies that there is anything involved or of any sum or value whatsoever in this suit.

Denies further that there are any valid patent rights whatsoever belonging to the plaintiff; or that there are any valid patent rights whatsoever set forth in the complaint; or that the defendant infringed upon any rights of plaintiff whatsoever; or that there is any reason for enjoining the defendant from doing anything whatsoever.

IV.

Denies that Frederick Heath was the true or original or first inventor of any new or useful improvement in the process of hollow wall construction whatsoever or in the process of hollow wall construction by means of hollow tiles, or of any improvement in hollow wall construction whatsoever, of which defendant is given any information by the bill of complaint, or by the alleged letters [10] patent referred to therein, or of which defendant has any knowledge, which was not known to, or used by, others, or which did not appear in a printed

publication in this country prior to the alleged discovery or invention thereof by said Frederick Heath.

V.

Denies that said Frederick Heath at any time made an application for letters patent of the United States for an improvement in process of hollow wall construction.

Admits that said Frederick Heath on July 7th, 1913, made application for letters patent of the United States for an alleged improvement in hollow wall construction; but in regard thereto defendant denies any knowledge as to whether said Heath duly or at all complied with the conditions or the requirements of the law governing the premises.

Admits that on said application for patent letters patent of the United States were granted February 6th, 1917, No. 1,215,149, in pursuance with the order and decree of the Court of Appeals of the District of Columbia, but with regard thereto defendant alleges that the alleged letters patent at the time they were issued were and ever since have been, and now are invalid and null and void for said decree of the Court of Appeals was based on a mistake in the facts as to the prior state of the art with reference to said alleged invention of said Frederick Heath, and hereinafter set forth, and in proceeding substantially *ex parte*, that the Patent Office had previously rejected said application for patent on prior letters patent of the United States, and there was no evidence introduced in the Patent Office, or presented to said Court of Appeals, as to

the prior art concerning said alleged invention outside of the letters patent cited by the Patent Office, nor as to the manner in which the invention set forth in such references cited by the Patent Office were in practice used by the public in general, and particularly those interested in said art; all of which facts defendant is [11] prepared to prove as hereinafter set forth, and which facts, when proved before this court, will render the said decision and decree of said Court of Appeals no longer applicable to the premises, but to the contrary will show the reversal of the Patent Office to be an error upon all the facts relating to the premises, and will establish that the Patent Office, in rejecting said application for patent was correct and acted according to law.

Defendant further denies that any valid letters patent were issued or delivered to the said Frederick Heath at any time, or that there was by virtue thereof any right whatsoever vested in said Frederick Heath.

## VI.

Defendant denies any knowledge as to whether said Frederick Heath at any time assigned or transferred or set over unto plaintiff all or any of his the said Heath's alleged right or title or interest in or to the invention pretended to be thereby secured, or of any rights or interest or claims arising thereunder, and further denies that the plaintiff became or now is the owner of any interest in any valid letters patent whatsoever.



## VII.

Denies that the defendant has been or now is in any manner infringing on said alleged letters patent or the pretended rights of plaintiff thereunder in the District of Washington, or any other place.

Denies that since the date of said alleged letters patent plaintiff has engaged in the business of manufacturing or advertising or of selling hollow tile; but alleges that it was engaged in such business long prior to the issue of said alleged letters patent.

Defendant further denies that it now is or at any time was manufacturing or selling hollow tile adapted to be used, or intended to be used, only in hollow wall construction purported to [12] be covered by said alleged letters patent.

Defendant further denies that it has at any time advertised hollow tile adapted to be used only, or intended to be used only, for hollow wall construction purported to be covered by said alleged letters patent; or that it induced any person to purchase any time from it by instructing such person how to construct walls with said tile, in any manner infringing upon the alleged letters patent whatsoever.

Defendant further denies that within the district of Washington, or elsewhere, at any time it has constructed or has caused to be constructed, or been interested in, or party to any hollow wall construction, which contained or embodied said alleged invention or alleged improvement described in said alleged letters patent, or has in any wise infringed upon the latter, or in any wise contributed to any infringement upon said alleged letters patent, or that plain-



tiff has sustained any damage, or will sustain any damage, by reason of anything done by defendant, of which defendant intends to do whatsoever.

And defendant further answering, for its first affirmative defense, alleges:

That defendant is a manufacturer of hollow brick and hollow tile designed and intended for general structural purposes as may be suited to the convenience of the purchaser, and defendant has no control whatsoever as to the use of such hollow tile or building blocks by its purchasers; that it never engaged at any time in the construction or buildings of hollow walls, and has no knowledge whatsoever of any building being erected in the district of Washington, or even elsewhere, using hollow tile or building blocks purchases from defendant in the construction of walls, infringing the alleged invention claimed by plaintiff to be protected by said letters patent.

And defendant further answering, for its second affirmative defense, alleges: [13]

That said alleged improvement of said Frederick Heath concerns an art and subject matter which were highly developed before said Heath entered the field thereof with his alleged improvement, as shown by the following letters patent of the United States duly published, to wit:

Denison	942,621	Dec. 7, 1909.
Byhum	744,480	Nov. 17, 1903.
Thompson	222,211	Dec. 2, 1879.
Lovett	814,973	Mar. 13, 1906.

Fisher	781,413	Jan. 31, 1905.
Yarnall	695,594	Mar. 18, 1902.
Johnson	837,572	Dec. 4, 1906.
Fisher	817,471	Apr. 10, 1906.

And also by the publication appearing in the Engineering News, Vol. LXVII, No. 6, issued February 8th, 1912, in the article entitled "Proposed specification for hollow clay tile building blocks."

Therefore, if the alleged improvement of said Heath did constitute an invention it was of very narrow, specific and limited character, and must be construed accordingly in order not to encroach upon the rights which were vested in the general public prior to and at the time the said Heath entered said field.

That when said application for letters patent referred to in the bill of complaint herein came up for examination before the Commissioner of Patents of the United States, the latter rejected said application because the alleged invention therein described and claimed lacked patentable novelty, and cited against the same the above specified letters patent, and that thereupon the said Heath amended his application so as to distinguish his alleged invention if possible from the prior state of art as described by said prior letters patent, and he did then disclaim and waive, abandon and cancel any broader claim of invention that in the claim of his said alleged letters patent specifically set forth.

And defendant further answering, for its third affirmative defense alleges:

That in fact the alleged letters patent, in the bill of [14] complaint referred to, are invalid, and null and void, for the reason that the alleged improvement therein described was devoid of patentable novelty as apparent from the prior art disclosed in the references set forth in defendant's preceding second affirmative defense. And for the further reason that said alleged improvement was also known and in public use in the United States before the alleged invention thereof by said Frederick Heath; all of the features of said alleged improvement being known to and used by the building department of Cleveland, Ohio, and by divers other persons in said city and in other places, as defendant is informed, and with regard to the particulars of which defendant is now making due search, and will disclose the same by amendment to this answer, or otherwise, as the Court may determine upon having ascertained the same.

WHEREFORE, The defendant prays that the bill of complaint herein be dismissed, and that it recover its costs and disbursements herein.

AMERICAN FIRE BRICK COMPANY.

By CHARLES P. OUDIN,

President.

M. E. MACK,

Solicitor and of Counsel for Defendant.

State of Washington,

County of Spokane,—ss.

I, Charles P. Oudin, being first duly sworn, depose and say that I am the president of the American Fire Brick Company, the above-named defend-

ant, and that the facts contained in the foregoing answer are true as I verily believe.

CHARLES P. OUDIN.

Subscribed and sworn to before me this 26th day of October, 1920.

[Seal]

M. E. MACK.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 17, 1920. Wm. H. Hare, Clerk. By Eva M. Hardin, Deputy. [15]

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In the District Court of the United States for the Eastern District of Washington, Northern Division.

IN EQUITY—No. 3390.

HEATH UNIT TILE COMPANY,

Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY, and  
RICHEY & GILBERT COMPANY,  
Defendants.

**Answer of Richey & Gilbert Company.**

To the Honorable Judges of the District Court of the United States in and for the Northern Division of the Eastern District of Washington.

RICHEY AND GILBERT COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Washington, having its principal place of business in the city of Yakima, Washington, for answer to the bill of com-

plaint of the Heath Unit Title Company in the above-entitled case, says:

That it denies each and every allegation contained in the complaint of the plaintiff herein, and having fully answered, prays that it may go hence without day and recover its costs herein expended.

RICHEY & GILBERT COMPANY.

By H. M. GILBERT,  
President.

J. H. IMMEL,  
Solicitor for Defendant.

Filed in the U. S. District Court, Eastern District of Washington, Apr. 26, 1920. Wm. H. Hare, Clerk. By Eva M. Hardin, Deputy. [16]

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In the District Court of the United States, Eastern District of Washington, Northern Division.

IN EQUITY—No. 3390.

HEATH UNIT TILE COMPANY,  
Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY and  
RICHEY & GILBERT COMPANY,  
Defendants.

**Stipulation Re Making Up of Record.**

In the matter of the above-entitled case, by and with the consent of the Honorable Judges of the District Court of the United States, in and for the Northern Division of the Eastern District of Wash-



ington, it is hereby stipulated by and between counsel as follows:

First, that the defendant, the American Fire Brick Company, will file its answer on the same day with the filing of this stipulation and that the objection shall not be made to the filing of the answer subsequent to the expiration of the time last provided by previous stipulation.

Second, that the plaintiff may proceed at once to take depositions under Rule 47 of the various witnesses in San Francisco, Los Angeles and elsewhere, and of certain witnesses in Tacoma and Seattle who may be unable to attend the trial without notice other than that of this stipulation. Due notice will be given to the clerk of the court and to counsel of defendants herein of the various witnesses examined *by* defendant shall not urge their right under the rules to attend and cross-examine, nor will they object to the admission of the testimony on such grounds; it is further stipulated, however, that the defendant, the American Fire Brick Company, shall be furnished a copy of the interrogatories and answers, sent [17] by mail within three days after the closing of the direct examinations, and shall have opportunity to mail written cross-interrogatories to each witness, to be answered, acknowledged before a notary public, and filed, and considered as a part of the deposition with the same effect as though defendant's counsel had attended and cross-examined by oral interrogatories and answers; and it is stipulated that certain of the witnesses for

either party may testify in open court at the trial in due form.

Third, it is stipulated that the complete record of the case of the Heath Unit Tile Company versus the Columbia Brick Works shall be furnished to the Court and counsel and this record shall be considered by the counsel for the respective parties, as a part of the record and evidenced in this present above-entitled case. The copy for the Court shall be certified by the stenographer making copies from the records in possession of the clerk of the United States District Court at Portland, Oregon, and that certificate of the clerk of the court shall not be required.

L. L. WESTFALL,  
Solicitor for Plaintiff.  
M. E. MACK,  
Counsel for Defendants.

Filed in the U. S. District Court, Eastern District of Washington, October 27, 1920. Wm. H. Hare, Clerk. By Eva M. Hardin, Deputy. [18]

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In the District Court of the United States, Eastern  
District of Washington, Northern Division.

IN EQUITY—No. 3390.

Patent Number 1,215,149.

HEATH UNIT TILE COMPANY,

Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY and  
RICHEY & GILBERT COMPANY,

Defendants.

**Proceedings Had in Open Court.**

By Mr. MACKLIN.—The plaintiff will say at this time that between the time of the cancellation of the defendants' license contract and up to the present time all damages are waived.

Mr. MACK.—All damages are waived?

Mr. MACKLIN.—The question of damages will take some considerable time. The question of infringement, I think, will be admitted in a few minutes.

The Richey Gilbert Company as a defendant is here only to fill out and complete the infringement, under the doctrine of contributory infringement and it is necessary to show that the American Fire Brick Company makes these tile for the purpose of building them into a wall, and to complete the infringement of the patent claims, which call for a wall construction having these characteristics, it is necessary to show them built into a wall.

I believe that you represent, do you not, Mr. Mack, the Richey Gilbert Company?

Mr. MACK.—Yes, I would like to have my appearance entered for them. [21—1]

Mr. MACKLIN.—I would like to submit the certified copy of the patent in suit and a copy of the articles of incorporation of the plaintiff company, and a certified copy of the assignment from the patentee to the plaintiff company, which is a mere matter of form.

The COURT.—They will be admitted.

The documents admitted in evidence and marked Plaintiff's Exhibits 1, 2 and 3.

Mr. MACKLIN.—I also have for the information of your Honor a certified copy of the decision of the Court of Appeals of the District of Columbia, holding that the invention by Mr. Heath is patentable



and directing the Commissioner of Patents to issue the patent to him.

Mr. MACK.—I object to that as incompetent, irrelevant and immaterial, and the same would be true of the decisions of the Commissioner of Patents.

The COURT.—The Court is bound to take judicial knowledge of the decision in any event and it will be considered for what it is worth, like any other decision.

The decision of the Court of Appeals admitted in evidence and marked Plaintiff's Exhibit No. 4. [22—2]

In the District Court of the United States, Eastern District of Washington, Northern Division.

IN EQUITY—No. 3390.

HEATH UNIT TILE COMPANY,

Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY and  
RICHEY & GILBERT COMPANY,

Defendants.

**Stipulation.**

In the matter of the above-entitled case, by and with the consent of the Honorable Judges of the District Court of the United States, in and for the Northern Division of the Eastern District of Washington, it is hereby stipulated by and between counsel as follows:

First, that the defendant, the American Fire

Brick Company, will file its answer on the same day with the filing of this stipulation and that the objection shall not be made to the filing of the answer subsequent to the expiration of the time last provided by previous stipulation.

Second, that the plaintiff may proceed at once to take depositions under Rule 47 of the various witnesses in San Francisco, Los Angeles and elsewhere, and of certain witnesses in Tacoma and Seattle who may be unable to attend the trial without notice other than that of this stipulation. Due notice will be given to the clerk of the Court and to counsel of defendants [23—3] herein of the various witnesses examined but defendant shall not urge their right under the rules to attend and cross-examine, nor will they object to the admission of the testimony on such grounds; it is further stipulated, however, that the defendant, the American Fire Brick Company, shall be furnished a copy of the interrogatories and answers, sent by mail within three days after the closing of the direct examinations, and shall have opportunity to mail written cross-interrogatories to each witness, to be answered, acknowledged before a notary public, and filed, and considered as a part of the deposition with the same effect as though defendant's counsel had attended and cross-examined by oral interrogatories and answers; and it is stipulated that certain of the witnesses for either party may testify in open court at the trial in due form.

Third, it is stipulated that the complete record of the case of the Heath Unit Tile Company versus

the Columbia Brick Works shall be furnished to the Court and counsel and this record shall be considered by the counsel for the respective parties, as a part of the record and evidence in this present above-entitled case. The copy for the Court shall be certified by the stenographer making copies from the records in possession of the Clerk of the United States District Court at Portland, Oregon, and that certification of the clerk of the court shall not be required.

L. L. WESTFALL,  
Solicitor for Plaintiff.

W. E. MACK,  
Counsel for Defendants. [24—4]

**Statement of Testimony in Narrative Form as Prepared by Counsel for Appellant and Appellee.**

**Testimony of Charles P. Oudin, for Plaintiff.**

CHARLES P. OUDIN, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. MACKLIN.)

My residence is 2327 West Pacific Avenue; my age, sixty-four and my occupation is clay manufacturer. I have manufactured Heath hollow tile and other forms, namely, the Dennison tile. Previously, I was operating under a license from the Dennison Company and changed to manufacturing the Heath tile. The circumstances were—(Objection). The Dennison Tile Manufacturing Company of Cleveland, Ohio, changed their ownership, and

(Testimony of Charles P. Oudin.)

the new owners of the patent had a new method of marketing their tile which was entirely obnoxious to us. Regarding considering the tile superior and becoming a licensee of the Heath tile—(Objection).

The COURT.—He may answer. It calls for his opinion as an expert.

The WITNESS.—We investigated the Heath tile and found it far superior to the Dennison tile, for the reason that the Dennison tile required for a twelve inch wall seven distinct pieces of tile, whereas the Heath tile only required three distinct pieces. Other advantages were the rapidity of putting it into a wall on account of its being square and not of odd shapes, the way the Dennison tile was. I have built these tile (indicating Heath tile) since the cancellation of the contract, intending that they should be used in wall construction, covered by the patent in suit.

Cross-examination.

(By Mr. MACK.)

We could have continued using Dennison tile, but did not like the way they were doing. [25—5]

**Testimony of Frederick Heath, for Plaintiff.**

FREDERICK HEATH, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. MACKLIN.)

My age is fifty-nine; I live at Tacoma, Washington; my business is architect. I have practiced



(Testimony of Frederick Heath.)

general architecture for nearly forty years. My practice has been a general practice, building all kinds of buildings of a larger class than usual, such as warehouses, large churches, business buildings of various kinds, colleges, school buildings. In the course of my work I frequently make a study of and specify the character of building material to be used in such structures. I am the Frederick Heath who appears as patentee of the patent in suit.

Q. Will you please state briefly the circumstances which led up to your making this invention?

Mr. MACK.—We object to this for the reason that that has all been gone over in the other case. I do not object to anything new, but I do not see the necessity for repetition. Mr. Heath testified in the other case and I think the Court understands that that testimony is competent as testimony in this case.

Mr. MACKLIN.—This is an entirely new suit between different parties, that is, different defendants. The circumstances of Mr. Heath's testimony in the former suit were these: Three years ago, in the period of the war, and an entirely different set of surrounding conditions, and it is submitted that after the first preliminary statement by Mr. Heath his testimony will be very directly to the point and for the purpose of establishing to the Court what is before him.

The COURT.—Proceed then but make it supple-



(Testimony of Frederick Heath.)

mental to the other testimony as far as possible.  
[26—6]

The WITNESS.—It is directed to the use of hollow tile in buildings. I have had occasion to use various kinds of hollow tile and in their use I have discovered some of their advantages and some of their disadvantages; and that use of the various kinds of tile is what led to the designing of this present form. The Dennison tile I have used, a large number of them, and I discovered in them certain defects that caused a weak wall and expensive work in laying and also in vertically positioned tile I discovered certain defects that led to the designing and working out and producing of this present form. I occupied, I guess, a portion of my time for nearly two years in working that problem out. That resolved itself into the wall we have here as an exhibit in which a tile is used having two voids with two center webs and a single tile, the single tile being of a common dimension with the large tile so that when they are laid in an interlocking bond there is an alinement of the bearing webs, one over the other. The particular advantage of a type of this kind is that it gives a level bed for spreading on the mortar so that it is easy for the mason to level up his work. With the Dennison tile you have in an eight inch wall three different beds, and where buttresses and pilasters enter into that it makes a continual stepping down so that it is puzzling to the mason, loses time, and it increases the cost of the work. At the same time, in making these different

(Testimony of Frederick Heath.)

offsets, he sometimes breaks the tile and breaks the continuity of the bond and also the alinement of webs, one over the other. In the use of the tile that I have designed, that is entirely obviated and these beds are carried throughout the wall perfectly level; and with the use of the smaller tile, which is based upon a four inch thickness, it is possible to meet every condition of wall thickness upon gradations of four inches without the cutting of the tile. That is not possible in any other form of tile construction. The proportioning of the different sizes of tile as I have shown in my patent represents a great deal of time and study to make the thickness of the webs, the height [27—7] and everything conform to the present established customs and uses in brick work. When a mason takes this tile and lays it in a wall he is using the same method in every respect that he has learned in his trade of laying brick work. (Indicating to the Court.) The advantages of this that are quite marked are that this alinement of webs, one over the other, is almost automatic—it is practically automatic, and as the mason lays up the wall, this block on one side and this on the other, it must always come that way. If I may illustrate that, you can see that by moving a tile back and making the bond in such a manner (indicating) this relation to these webs has not been affected; this can be moved along in any direction and you will always have perfect alinement. The alinement of the web remains perfectly constant all the time as these distances between the two tiles are

(Testimony of Frederick Heath.)

gauged by the fingers in the same way a mason spaces common brick. In vertical construction (standing tile on end) that is almost impossible to accomplish.

Mr. MACKLIN.—If your Honor pleases, I have here copies of patent which are the same as those urged in the Portland suit. Mr. Mack is resting on this set of patents to anticipate the structure here. I would like Mr. Heath to briefly explain each of these to the Court and if Mr. Mack will permit, I will present a stipulation that the copies of the patent to be used with full force and effect as though they were certified.

Mr. MACK.—No objection except to the explaining of the patent, which I think was done before.

Mr. MACKLIN.—These are the same patents that were before the Patent Office officials.

The COURT.—How many are there?

Mr. MACKLIN.—Seven or eight, but the defense in the former case, and here, relies principally on the three patents, the Dennison, Johnson and Lovett.

The COURT.—Are these the ones referred to by Judge Bean? [28—8]

Mr. MACKLIN.—Yes, sir.

The WITNESS.—The patent I have in my hand was issued to Johnson, No. 837572, and shows the construction of the Johnson block. The patent says that this method of vertical construction can be applied to walls. Now, that is illustrated by taking this tile and setting it on end, so that the outer shell

(Testimony of Frederick Heath.)

at that point and the outer shell at this point come over the outer shells and webs of the tile below. That is practically what is called the vertical construction of the Johnson patent, as controlled by the National Fire Brick Company of New York. What takes place here in this is that in laying this in a wall the tile has no alinement like that (indicating) crossways. These (cross-webs) through here (indicating) are all out of alinement, and the only bearing is upon these two lines here. That is more often the case in building a wall than the other way. We have photographs and drawings here showing that. Now, in this case they only have a contact of mortar that can be placed upon this narrow surface, and the tile wall can carry only the strength that is received from this contact of mortar between the edges so that it is not used for heavy wall construction, never been accepted as heavy wall construction by any building ordinance. The fact is, in order to carry that out and make it adaptable for house construction, they have another patent in which they lay a piece of wire along on top of that, and then put mortar on so as to hold the mortar, and as that has been drafted, it amounts to the expense of putting the wire mesh in. As to the comparative strength of my wall with brick—the actual tests that we have had, taking the average of fifteen different tests from five or six different factories, show that the tile will carry the same load as a solid brick wall. Now, that is on account of the brick wall being made up of two materials, the one is



(Testimony of Frederick Heath.)

hard burned clay and the other is mortar. The mortar is only one-half as strong [29—9] as the brick is so that it doesn't make any difference how strong the brick might be, the first failure of a brick wall is in the crushing and movement of the mortar. Now, that is one of the things I used in figuring out this tile, to develop all mortar bed that is used in brick work and masonry of all kinds, and then the voids are cut out of the solids and these are in the form of blocks and have an equal strength of the mortar. Now, that in the actual tests has proved out to be that way. These tests were made by the Bureau of Standards of Washington and by men at many universities and testing laboratories, so that that wall construction is accepted by building ordinances for carrying the same loads and under the same conditions as a solid brick wall; and it is the only tile that is on the market that has that privilege. Another thing, it conforms to the requirements of the underwriters and to all of the established methods of building construction.

The Dennison Patent, No. 942,641, of which I have a copy, is this form of "T" shaped. It has this feature of alinement of webs and practically the same number of webs as I have in mine. The thickness of the webs and the over-all measurements are practically the same. But the disadvantage of it is that it must be bedded upon two surfaces at a time. To illustrate that, take this Dennison tile. Mortar must be placed upon this surface and upon that surface and then the tile put down in place and



(Testimony of Frederick Heath.)

then it is struck with the trowel and brought to a bearing. In doing that, many times the mason does not put enough mortar along here and at these different (indicating) surfaces to get a smooth bearing up and down in these webs. Now, I have had a personal experience with that in building, and taking down walls that were constructed in my own buildings, to see what the result was. I found that the mortar under these different surfaces did not carry through and for that reason it does not make as strong a wall as where you can bed the mortar upon a level surface and bring the block to bearing under exactly the same conditions and in the same manner as in laying brick and stone. [30—10]

The Lovett Patent, No. 814,973, shows two single voids only, one larger than another, in such a manner that they get an interlocking bond or an overlapping bond, but where the single web comes in on the inside of the single block it stands directly over a void in the block below, and the single web is reversed in each course so that there is only a single course of direct bearing webs in the center of the wall. The difference between the Lovett and mine is that in constructing a wall twelve inches in width, Lovett has only three continuous webs vertically one over the other while mine has six vertical webs, one over the other. There is no similarity at all in the two constructions. There is a similarity of the reversing of these blocks, one over the other in alternate courses, but there is only one instance, and that is in the center, where these webs run, one over

(Testimony of Frederick Heath.)

the other. That is the principal difference in the patents.

Q. Have you secured patents in any foreign countries, Mr. Heath?

Mr. MACK.—Objection.

The COURT.—He may answer.

The WITNESS.—Yes, I have applied for about twenty-eight foreign countries. I think about twenty of these have been allowed. There was not a single citation of prior art to anticipate the patent—not one in any of these foreign countries.

The COURT.—It is largely cumulative. I don't think its use in foreign countries would make much difference. It is used extensively in this country.

The WITNESS.—In England we have now a company organized for the manufacture of my tile. (Objection.) This company has been organized and they are manufacturing now in these countries. They have bought machinery and they are constructing a factory in France at the present time, and Belgium has been practically sold, waiting for the issuance of the patent. It has been allowed but [31—11] it has not been formally issued. The negotiations have been started in Switzerland and Spain and Portugal. Japan has been sold, the money placed in escrow and it is in process of being transmitted to us now. New Zealand has been sold under the same conditions and the money is being transmitted, and Australia has been sold also and the money is in transit now. We have a plant in Cuba and the Cuban patent has been sold.

(Testimony of Frederick Heath.)

The COURT.—I think you have gone far enough on that subject.

The WITNESS.—As to the size of the enterprise: The minimum royalty we received from the English patent is \$25,000 for the first year and the second year \$50,000, and the third year it is \$75,000 and the fourth year it is \$100,000, and for all years following \$100,000. The royalty per ton is twenty-five cents. The Cuban patent is sold for \$25,000. That is a sale direct. That was transferred without any royalties whatever. The United States is being covered by operators licensed under this patent. At the present time, the States of Washington, Oregon and California are licensed.

Q. Why have you not licensed the great eastern states?

Mr. MACK.—I object to that as immaterial.

The COURT.—I think I will sustain the objection to that.

In Canada I have licensed British Columbia, Alberta, Saskatchewan and Manitoba.

Cross-examination.

(By Mr. MACK.)

My ability as a salesman, I think, is very ordinary. I do not think it is in keeping with my ability as an architect. [32—12]

Witness excused.

**Testimony of W. C. Mitchell, for Plaintiff.**

W. C. MITCHELL, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

**Direct Examination.**

(By Mr. MACKLIN.)

My age is forty-eight; residence Seattle, Washington; occupation clay worker and efficiency engineer of clay plants. I have been engaged in various parts of the United States, Canada, and Mexico and the West Indies; from the Gulf of Mexico to the St. Lawrence River and from the Atlantic to the Pacific for about thirty years. I am familiar with the various forms of hollow tile construction including the Heath unit tile wall construction. I just recently erected an addition to the Gas City Brick plant at Medicine Hat, Alberta, Canada, for the purpose of manufacturing the Heath tile. The Heath tile has been successful in that vicinity. They received an order, before we had really completed the first car, for 75 carloads of Heath tile, and a few weeks afterwards we also had an inquiry for a tile order for 125 carloads of Heath tile.

Q. How is it considered by this manufacture with relation to other tile?

Mr. MACK.—That is a conclusion of the witness.

The COURT.—You are not asking him his opinion but you are asking the opinion of somebody else.

A. Personally, I consider the Heath system of



(Testimony of W. C. Mitchell.)

wall construction to be the most simple system that I know of.

Q. From your knowledge of clay workers, masons, engineers and architects, would you consider that to be within the ordinary mechanical skill or day's work of such men?

Mr. MACK.—I believe that is a question this Court has [33—13] got to determine.

The COURT.—That is true ultimately; yes. In case he can answer, he may?

The WITNESS.—I would consider it—in the ordinary mechanical skill you say?

Mr. MACKLIN.—I mean do you consider the making of the type of wall, the designing of it, to be within the ability of a mechanic or architect or engineer, or does it require invention, in your opinion?

Mr. MACK.—Same objection.

The COURT.—Yes, but he may answer.

Why, I would think it would require the ability of a person who is familiar with construction work, designing and constructing buildings—in other words, an expert in that particular line.

Q. How does it compare in factory cost of manufacture with other tile?

Well, I have manufactured both the Heath tile and the Dennison tile and I consider the Heath tile a much more simple tile to manufacture, and in fact a cheaper tile to manufacture, and is equally as cheap as the ordinary common tile to make.



(Testimony of W. C. Mitchell.)

Q. That is a matter of experience or opinion?

That is a matter of experience; yes, sir.

Cross-examination.

(By Mr. MACK.)

Q. Mr. Mitchell, if you were to be handed—oh, about nine or ten carloads of things looking like that and you never saw them before—can you imagine that condition—that you hadn't any experience only as a brick layer and having only had experience with the ordinary brick—you can imagine that, can't you? Well, [34—14] go on and see—how would you lay that tile down? What would you do with that thing if I just handed it to you and asked you to go out and build a wall?

I would first spread my mortar and then I would lay my tile on it and strike the joint, and break the bond by tying two together, and put two of them this way. (Indicating.)

“Q. Then you would put your two, one-half there and after you got a little bit further along would just reverse?”

“A. Yes, reverse every tire.”

“Q. Then, to lay your tile that way wouldn't take any mechanical—I mean inventive genius if you had the tile, would that?”

“A. Well, you have got the greater strength in your wall by having that type of tile.”

“Q. I am not asking you that? I am seeing how the tile ought to be laid? A. Yes.”

“Q. Does not show any mechanical genius, any inventive genius that is the idea?”

(Testimony of W. C. Mitchell.)

“Well, I should think it would. Otherwise, they might be laid without any bond whatever.”

“Q. Well, eliminate that, you know what I am trying to get at, but I am not getting it. Whether you laid the tile flat—now I have got the tile, you know, I have got a million of them and I have got my mortar spread just fine—now, whether I laid that tile flat in the mortar that way, whether I laid the tile that way, don’t take any genius to do that?”

“A. Yes, sir, it would have a different effect entirely.”

“Q. But the manner of laying it couldn’t make any difference?” [35—15]

“A. Yes, sir, it certainly would.”

Mr. MACK.—I want to show by this witness that it is no wonderful invention to take a tile, and, rather than stand it upon its edge we will lay it down.

Mr. MACKLIN.—That is conceded, that there is no invention in laying a tile either on edge or down. You must examine the claims of the patent to get the various relationships.

Testimony of witness concluded.

The COURT.—Unless the defendant intends to offer testimony in opposition to what you have offered, it would be cumulative, would it not?

The COURT.—Well, we will take an adjournment until two o’clock.

WHEREUPON an adjournment was taken until two o’clock P. M.

**Deposition of F. R. Boedecker, for Plaintiff.**

F. R. BOEDECKER, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

**Direct Examination.**

(By Mr. MACKLIN.)

My name is F. R. Boedecker; age, 33; residence, 9401 South Sheridan, Tacoma. I am a contracting brick mason. I go out and figure on plans at all the different architects' offices, figure on brick and tile work and all masonry construction. After securing a contract I carry the building to completion under the specifications and plans of the architects and owners. I am familiar with a wall construction known as the Heath unit tile wall. Patent, No. 1,215,149, granted February 6, 1917, to Frederick Heath represents the Heath tile and tile wall as I am accustomed to seeing and building them, and this drawing represents exactly the walls I have built with Heath tile. I have taken several jobs, but we were not specifying Heath unit tile, we just specified "tile." I put Heath unit-tile into the construction of those walls because [36—16] I thought it was the best construction. This is a catalogue of the Heath Unit Tile Company showing cuts of the different sizes and units of Heath unit tile in wall form and also such as jambs, lintels and pilasters, showing the simple methods of construction with the Heath unit tile.

Mr. MACKLIN.—This catalogue or pamphlet just referred to is offered in evidence and the

(Deposition of F. R. Boedecker.)

notary is instructed to mark the same Plaintiff's Exhibit "AA," Plaintiff's Catalogue.

Thereupon said catalogue was marked "Plaintiff's Ex. 'AA,' Plaintiff's Catalogue."

The WITNESS.—I have actually built and seen built the constructions shown in the various views in this catalogue in my work. I have used all kinds of hollow partition tile and load-bearing tile, and the only load-bearing tile I have ever used other than Heath unit tile where the webs were in vertical alignment were Dennison "Interlocking" tile. The Heath unit tile in my experience is the cheapest and best tile from the time it leaves the kiln until it goes into the wall. I might add my reasons: When they leave the kiln they have to be transported and they have to be handled, and they are easier to handle because they all come in the same size and they can be stacked easily in cars or on trucks. And the same principle works on the buildings: They are easier to handle on scaffolding and around buildings for the same reason. In the actual construction of the walls the Heath unit tile is always on a level bed and therefore simplifies the construction work. The Heath unit tile in the actual construction of walls where pilasters and piers project from the main wall, all of the courses as the work progresses are level. In that way it is easier and saves time and money in the actual construction work. Well, I will state that it is impossible to construct a wall of Heath unit tile without the webs being in vertical alignment, unless there is an offset, which does not



(Deposition of F. R. Boedecker.)

happen very often, only in putting fancy work of corbolar and dental work, which is just in the topping out of the building in [37—17] such places. And in bonding different thicknesses of walls from the twelve-inch up the bonding works naturally and perfectly. It would be impossible to get your webs out of alignment. The laying of this Heath tile conforms to the methods usually employed by brick masons with the exception that a brick wall is tied together or bonded with brick headers or brick turned endwise in the walls, while the Heath unit tile bond themselves, each and every course. I have had considerable experience with heat insulation and moisture resisting characteristics and I have found that the insulating value of hollow tile and heat resisting value is much better than in solid material. I have found in my experience that the hollow unit tile resists water much better than any other tile—load-bearing tile—for the reason that the bed joints are level, whereas in other tiles, such as, for example, the Denison “interlocking” tile, the beds are on different levels, two different levels to every eight inches of wall, so that in making a seventeen-inch wall and a seventeenth-inch pilaster you would have eight different levels to work on in the actual construction of that wall, whereas if you were using the Heath unit tile you would have one level bed, and it would be pretty hard for water to either soak through or be drawn through a wall of this description of the Heath type. Why, the water gets through a wall at the cross-joints, soaks through



(Deposition of F. R. Boedecker.)

and drops down from one level to another. It cannot return or it cannot get out, it keeps soaking through and dropping down, as the construction of that type of wall, Denison "Interlocking" tile wall, the levels run in in every instance. The Denny Renton Clay & Coal Company, of Seattle, Washington manufactures the Heath unit tile in this vicinity. At the present prevailing prices in this particular part of the country Heath tile costs about the same or a little bit more than common brick, but I have been able to secure the use of Heath tile in preference to brick in most every instance in spite of this difference in price. [38—18]

I have seen walls built of tile known as the Johnson tile, made at Chicago, Illinois. In that type of wall it is intended that all of the webs shall align throughout the wall in order to gain the greatest strength or load bearing characteristics, but in my opinion it would be impossible to build a wall and get all the web in alignment. A brick mason attempting to do such a thing as that would be fired before he got started because he would be unable to accomplish anything,—he could not get anything done.

I have never had one complaint about the material in that tile in my five years experience with Heath unit tile, for inside and outside construction. I have built walls where the Heath tile were exposed on the outside for finish wall, and, in my opinion, it makes the best looking finished tile wall, because the face shows—all of the tile are of the same size,

(Deposition of F. R. Boedecker.)

just like large brick. I will state further that all the courses run level and even, and all the tile are bonded and the cross joints, the vertical cross-joints, come one over the other in alternate courses, making a straight even wall. In constructing a tile wall of any thickness it is easier and simpler to lay walls with Heath unit tile because the mortar is put on the same level, and other tile, as I have found them, come in different sizes. The cause of this unevenness in other forms of tile is the difference in the shrinkage at the kilns while the tile are being burned. In speaking of the advantages of the narrow void in the double block, and the fact that it always aligns with the space between two blocks, above and below, the ordinary brick mason starting this wall uses his thumb between the two tile—of course, I do that myself and I imagine that is about the same system they all use—between the two tile, giving the wall joint. The space is equivalent to a vertical wall joint [39—19] absorbing the difference in the thickness of the tile making the two faces perfectly straight. If the outside aligns the rest of the voids have to. With Heath unit tile it is impossible to get off; it cannot be done.

(Deposition closed.)

**Deposition of George F. Heard, for Plaintiff.**

GEORGE F. HEARD, a witness called to testify in the above-entitled cause in behalf of the plaintiff after having been first duly cautioned and sworn, in answer to interrogatories propounded to him by Mr. MACKLIN, testified as follows:

(Deposition of George F. Heard.)

My name is George F. Heard; age, 34; my residence is Tacoma. I am a salesman for F. T. Crowe & Company, who handle building materials. I have been in this business for thirteen years, and I am familiar with various hollow tile wall constructions. I know the Heath unit tile wall and the method of using this tile. This catalogue (Plaintiff's Exhibit "AA") shows the Heath tile and Heath tile walls as I know them. I have recommended the use of the Heath unit tile over other tiles for walls of various kinds, particularly load-bearing walls, because I believe that it is the simplest tile for this purpose. It is the simplest from the standpoint of the brick mason who uses the material. They are easier laid and they all run in even course; and the labor cost is less than with other types of wall tile available in this vicinity or that I have any knowledge of. The general appearance of the finished job is much more attractive than other types of tile wall construction. I think it is stronger than other walls, due to the fact that the webs are in vertical alignment and produce a stronger wall. When tile are laid the vertical webs naturally form a perfect vertical alignment. [40—20] The labor cost has been proved to be less on numerous jobs that we have had connection with. The cost per cubic foot of the tile might be more than the cost per cubic foot of other tile, such as Denison's, but the saving comes in the reduced cost of mortar and labor of laying it into the wall; and it produces a finished wall at less cost per cubic

(Deposition of George F. Heard.)

foot than the other tiles, which is principally due to the labor saving, and the fact it makes a better wall we enthusiastically recommend Heath tile in preference to other tiles for wall construction. It makes a good heat insulation wall and a good strong wall. It is a very attractive appearing finished job.

(Deposition closed.) [41—21]

**Deposition of M. J. Nicholson, for Plaintiff.**

M. J. NICHOLSON, a witness called to testify in the above-entitled cause in behalf of the plaintiff, after having been first duly cautioned and sworn, in answer to interrogatories propounded to him by Mr. MACKLIN, testified as follows:

My name is M. J. Nicholson; age, 29; residence, 3909 North 24th Street, Tacoma; occupation, assistant building inspector for the city of Tacoma. I am required to be familiar with the various forms of building materials and wall constructions. I know of the Heath tile and wall construction. The illustrations, Plaintiff's Exhibit "AA," show the tile as I have actually seen it and know of it. It is a particularly strong tile wall on account of the alignment of the webs one over the other, as well as the more complete bond. It has been considered a success in this vicinity. The brick masons seem to prefer it over the Denison tile for laying up.

(Deposition closed.)



**Deposition of Earl N. Dugan, for Plaintiff.**

EARL N. DUGAN, a witness called to testify in the above-entitled cause in behalf of the plaintiff, after having been first duly cautioned and sworn, in answer to interrogatories propounded to him by Mr. MACKLIN, testified as follows: [42—22]

My name is Earl N. Dugan; age, 43 years; residence, Tacoma; occupation, architect. At the present time we have under course of construction the Rust Building, an office building, and bank and residence work, all under the course of construction at the present time, and various lines of work of an architect. This catalog, Plaintiff's Exhibit "AA," is an illustration of the Heath unit tile, and it illustrates the method of laying tile, and handling—the various methods in its use. The illustrations of this Patent No. 1,215,149 show the method of laying the Heath tile in walls of 12-inch and 16-inch thickness. This is a practical method that is being carried on every day and used quite extensively at present in this locality. I have specified the Heath wall construction at every opportunity since it has been in the market; in fact, I would have specified it sooner could it have been obtained. The reason for specifying this tile in place of brick, common tile or other types of hollow tile, the tile is simple in shape which makes it much easier to lay in the wall, also much easier to handle than the Denison tile, giving practically the same strength, if not more, therefore, ought to be more economical, which is always a thing to be considered from the architect's standpoint.



(Deposition of Earl N. Dugan.)

The sound proofness of the tile and the damp proofness would be fully equal to any other hollow tile that I know of. The simplicity of laying the wall would naturally result in the mechanic getting a more even bed of mortar, and the true vertical lines in the tile would have the result of more likely coming in the position intended, therefore, more likely to obtain a wall of equal or greater strength than with other types. [43—23] You get the bond in the wall, in the alternate courses, thus the bond occurs more often than in brick work and brings the middle void of the Heath tile directly over the space between the two tiles below and above. The tile is being manufactured by the Denny Renton people, a firm of high-standing and reputation, doing a large volume of work of different types of clay construction materials. The fact that this company is handling the material, and the reputation which this firm has, naturally relieves any question of doubt as to the superior character of the produce. Whenever the opportunity occurs I expect to recommend the use of the Heath tile and to explain the merits to prospective builders. I do not consider the design of the Heath wall tile within the development of the ordinary mechanic or architect, but the result of a discovery of principles which have been followed up and carefully worked out and developed into a system of construction heretofore unknown.

(Deposition closed.)

**Deposition of F. H. Godfrey, for Plaintiff.**

F. H. GODFREY, a witness called to testify in the above-entitled cause in behalf of the plaintiff, after having been first duly cautioned and sworn, in answer to interrogatories propounded to him by Mr. MACKLIN, testified as follows: [44—24]

My name is F. H. Godfrey; residence, 2915 North *w8th* Street, Tacoma; age, 39. I am a mechanical engineer,—consulting engineer, on mechanical equipment of buildings. I am familiar with the Heath system of building tile walls. I recognize that patent No. 1,215,149 as showing standard forms of construction of this tile and tile wall—as used in tile walls. I think it is much simpler in construction and stronger than other hollow tile constructions. The alignment of the web, the vertical web, gives a continuous bearing point throughout the height of the wall. The bond is practically ideal, it could scarcely be improved upon by any form of construction. It appears to me to be the result of a very thorough and comprehensive study, and with this tile a very ingenious method of avoiding the usual difficulties of tile construction has been secured. I personally know of buildings in which this Heath tile has been used in the construction of tile walls such as shown in this patent, there are several of them in this vicinity. The continuous air cell construction of the wall makes it valuable as an insulator, and I have used it for that purpose in boiler settings. I am familiar with the Denison “Interlocking” tile. The difficulty of laying up the Deni-

(Deposition of F. H. Godfrey.)

son tile and making the corner joints and joints around openings are too great to warrant its use. To summarize my experience the simplicity of Heath wall construction, enables the tile to be laid up with equal facility to brick, and being of larger units, allows much faster construction of walls. [45—25] The assignment of the vertical sebs carries the bearing points down through the walls directly, giving greater strength than is obtainable in any other tile construction. Each tile having a single bearing space, much more even bedding in the mortar is possible.

**Deposition of A. J. Huntington, for Plaintiff.**

A. J. HUNTINGTON, a witness called to testify in the above-entitled cause, in behalf of the plaintiff, after having been first duly cautioned and sworn, in answer to interrogatories propounded to him by Mr. MACKLIN, testified as follows:

My name is A. J. Huntington; age, 47; residence, 708 South M Street, Tacoma. I am a brick mason and brick contractor; occupation, president of the Northwest Brick and Tile Construction Company for the last seven years. I am familiar with various kinds of wall construction, both brick and hollow tile, and I am familiar with the Heath system of tile wall construction. I have laid them personally and superintended them. This catalog, Plaintiff's Exhibit "AA," is absolutely the way we lay them (Heath tile) in the wall; that is the only way. I would rather lay the Heath unit tile than any tile I

(Deposition of A. J. Huntington.)

have ever laid; and I will say I think I have had more experience on tile than any other man in this part here. The construction of the tile and the looks of it and everything pertains to being about as good tile wall or better than any I have seen around here. My intentions are to stay in the business, and I would prefer to use the Heath unit tile above all other tile.

(Deposition closed.) [46—26]

**Deposition of James Fisher, for Plaintiff.**

JAMES FISHER, a witness called to testify in the above-entitled cause in behalf of the plaintiff, in answer to interrogatories propounded to him by Mr. MACKLIN, testified as follows:

I am James Fisher; age, fifty-one, Tacoma. I am agent for the Denny-Renton Clay & Coal Company, in charge of the Tacoma branch. My company is now manufacturing and selling the Heath tile for use in wall construction. I suppose we are the biggest in this part of the country. The plant that this tile is made at is the biggest one unit in the United States. This tile that we are manufacturing there, the Heath unit tile, is made from the Renton shale, one of the best products known in this part of the country for paving brick or any vitrified material. What influenced my company to take up the Heath unit tile system was that, I wanted a tile; I had quite a big demand for load-bearing tile—that is what we class this tile—and I took it up with the management and general offices myself and asked



(Deposition of James Fisher.)

them for their permission to take it up with Mr. Heath to see if he would be willing to let us manufacture that tile. In fact, we were not handling any load-bearing tile and we wanted to get hold of the best.

Q. What are the characteristics of the Heath tile and wall construction which make it the very best, in your opinion?

Heath Tile is an easier tile to lay up, makes a stronger wall and more uniform. That is the tile we had the demand for and naturally a man wants to sell what he has a demand for and which gives the best satisfaction. The Denison "Interlocking" was sold here before we started to sell this. We had a wall tile, a lighter tile, commonly called "partition tile." We started about July 15th, to sell Heath tile and we have had very good success in selling it, having delivered about sixty thousand already in this territory. The biggest inquiry for the largest jobs are right now waiting on us. I am holding now approximately eighty-six [47—27] thousand double tile for construction work in the near future. I notified the factory within the last two or three days and gave them quotations on approximately one hundred thousand more of the Heath style of tile. We expect much bigger business in the early spring. The tile is giving entire satisfaction in this part of the country. It is considered a great improvement over the old tile. I sell on the basis that there is a ten per cent saving on the tile and ten per cent saving on labor of handling, putting into the wall. In



(Deposition of Frederic Shaw.)

all of our jobs so far this saving has been exceeded. We made it because our trade demanded the Heath unit tile.

(Deposition closed.) [48—28]

**Deposition of Frederic Shaw, for Plaintiff.**

FREDERIC SHAW, a witness called to testify in the above-entitled cause in behalf of the plaintiff, in answer to interrogatories propounded to him by Mr. MACKLIN, testified as follows:

My name is Frederic Shaw; my residence is Tacoma; 1509 North Fifth; age, 37; occupation, architect.

Q. Where is your place of business, Mr. Shaw?

A. 414-415 Tacoma Building.

Q. In your practice are you familiar with various types of wall construction? A. Yes, sir.

Q. And do you recommend and occasionally specify certain types? A. I do, yes.

The WITNESS.—I recognize Plaintiff's Exhibit "AA" as illustrations of different types of wall construction made of Heath unit tile and patent No. 1,215,149 illustrates wall construction using the Heath unit tile, and a sectional detail of the bond, as well as a perspective of one unit. These illustrations conform with the practice in this vicinity of laying Heath tile. From the standpoint of simplicity it is far superior in my estimation. It is the equal of anything of which I have any knowledge. I recommend this tile because of the advantages which this type of tile construction possesses over

(Deposition of Frederic Shaw.)

other types. To have designed it I believe required inventive genius. In view of the fact that no other type of hollow tile wall construction approaching this in design has been developed, I am convinced that considerable inventive genius was involved in this Heath type of wall construction. I am familiar with the Denison type of hollow tile.

(Deposition closed.) [49—29]

**Deposition of L. A. Nicholson, for Plaintiff.**

L. A. NICHOLSON, a witness called to testify in the above-entitled cause in behalf of the plaintiff, after having been first duly cautioned and sworn, in answer to interrogatories propounded to him by Mr. MACKLIN, testified as follows:

I am L. A. Nicholson; age, fifty-four; residence, Tacoma; occupation, civil engineer. I have been engaged in the practice of civil engineering thirty years. My experience has covered the designing and construction of concrete and reinforced concrete, tile wall and wood structures. I am familiar with the various types of hollow tile and load-bearing wall constructions which are in use in this vicinity and elsewhere. I am also familiar with the Heath system of building tile walls. I have studied the advantages of this construction as shown in patent No. 1,215,149. It has superiority over any other tile as to simplicity in handling and in the construction of the wall. The advantage in simplicity consists in its rectangular form, allowing the wall to be constructed with a minimum of adjustment by the

(Deposition of L. A. Nicholson.)

mason, allowing also a bonding of the tile in the wall similar to brick construction, allowing the wall built with these tiles to be laid up with a minimum of expense by reason of the speed with which the tile can be handled, and the consequent speed and efficiency with which the wall can be built. The flat mortar bed afforded by the rectangular form of tile increases the stability of this wall over a wall built with the usual forms of tile, distributing as it does the load evenly over the surface of the joints. The superior strength of this wall over other forms of hollow wall construction is obtained through the continuous web alignment, affording a column of material perpendicularly through the wall wherever the webs occur. This form of construction also affords a continuous air space, or, rather, a number of them increasing the insulating properties by making a cellular construction of the wall. [50—30]

Q. "In your experience with designers and construction engineers, is the evolution of such a unique character of wall within the province of such men or would it require unusual effort?

A. I consider that this form of construction is the result of study and design, developed only by engineering skill of a high order. The study and design of this block would precede the manufacture through the making of dies and the carrying on of experiments to determine proper dimensions of material, and this long before it would involve the services and thought of the trained technical mind

(Deposition of C. W. May.)

and would not be a matter possible of being worked out by 'the ordinary mechanic.'"

(Deposition closed.) [51—31]

**Deposition of C. W. May, for Plaintiff.**

C. W. MAY, a witness called to testify in the above-entitled cause in behalf of the plaintiff, after having been first duly cautioned and sworn, in answer to interrogatories propounded to him by Mr. MACKLIN, testified as follows:

My name is C. W. May; age, twenty-nine; residence, 3820 North 39th Street, Tacoma; occupation, industrial heating engineer. I have had experience with wall construction, in the use of hollow tile. My experience has been with the Heath unit tile. In my opinion walls built of Heath unit tile, as to simplicity, strength, appearance, insulating qualities, etc., are as good as anything I have had any experience with. It is economical. It can be laid the same as brick, same unit, only larger. As I remember it, from the cost of labor distribution of the Sedro Woolley job, Sedro Woolley, Washington, Northern State Hospital for the Insane, it was laid at the rate of between 550 and 650 tile blocks per mason per day.

(Deposition closed.)

**Deposition of E. J. Mathews, for Plaintiff.**

E. J. MATHEWS, a witness called to testify in the above-entitled cause in behalf of the plaintiff, after having been first duly cautioned and sworn,



(Deposition of E. J. Mathews.)

in answer to interrogatories propounded to him by Mr. MACKLIN, testified as follows:

My name is E. J. Mathews; 54 years of age, residing at Rainier Club, Fourth Avenue & Marion Street, Seattle, Washington; president of the Denny-Renton Clay & Coal Company. The nature of the business of the Denny-Renton Clay & Coal Company is the manufacture of clay products, including paving brick, *swee*r pipe, architectural terracotta, fire brick, drain tile, hollow building block, also mining of coal. Patent No. 1,215,149 shows cross-sections [52—32] of the Heath tile made into a load-bearing wall.

Q. Do these illustrations accurately show the forms of wall as you understand them?

The WITNESS.—Yes. They do. Our firm has been engaged in the manufacture of these Heath tile under a license agreement about six months. In considering the question of engaging in the manufacture of the hollow tile, our attention being called to the Heath tile, we made an exhaustive investigation as to its merits in comparison with other hollow building tiles, and decided that for load-bearing walls, the Heath tile was superior to other tile on the market. Several years ago we had manufactured a hollow tile for load-bearing walls, of different form from the Heath tile, but found it to be not very satisfactory nor easy to market, and as a result we gave up entirely its manufacture. For several months past we have been manufacturing Heath tile at our Renton Plant, and we are contemplating also



(Deposition of E. J. Mathews.)

to manufacture the Heath tile at our Portland Plant. We are receiving orders of Heath tile from week to week and have sold the larger part of the tile we have manufactured. We have made special investigation of the advantages from the manufacturer's standpoint of making the Heath tile before we entered into a contract to secure the license to permit us to manufacture this tile, as we did not care to undertake to make this product unless we could make it without undue loss in the process of manufacture. This meant that the die for making the Heath tile had to be well balanced so that the blocks would come from the auger machine in proper shape, under which conditions there would be only a minimum loss in the drying the tile and in burning them. We are also convinced that the Heath tile were so formed that when placed in the wall, the maximum load-bearing qualities of the tile is such as to simplify the construction of the wall, and to require less skill in wall construction than is required by the use of most other materials. I consider the design of the Heath tile a meritorious invention, [53—33] as it required, that the fullest consideration be given, first, to the matter of reducing to the minimum the manufacturing difficulties and losses, and second, to producing a tile, which when laid in the wall, no matter how placed, would always have the webs in vertical alignment, and thus develop the maximum load-bearing capacity. These things could not have been accomplished by mere minor mechanical changes in the form of the hollow building block

(Deposition of E. J. Mathews.)

which have been in use for many years, nor could they have occurred accidentally or in any way excepting by exhaustive study and planning. To illustrate my meaning in part, will say that if the design of the Heath tile was such that the block would not run smoothly through the die, and on account of this the loss in manufacturing would amount to as much as, say 12% or 15%, then the design of the Heath tile would be of no commercial value.

To summarize my opinion, will say that it was essential in making the design of the Heath tile to take into consideration and to accomplish three things, namely:

1. To so design the block as to permit its economical manufacture with minimum of manufacturing loss.

2. To so design the block that when placed in the wall either by skilled or unskilled hands, the webs of the block would always be in vertical alignment, in order thus to develop the maximum load-bearing capacity of the wall.

3. To so design the block that the construction of load-bearing walls would be simplified and the cost of labor in building them would be reduced.

(Direct examination closed.) [54—34]

**Deposition of B. F. Cake, for Plaintiff.**

B. F. CAKE, a witness called to testify in the above-entitled cause in behalf of the plaintiff, after having been first duly cautioned and sworn, in an-

(Deposition of B. F. Cake.)

swer to interrogatories propounded to him by Mr. MACKLIN, testified as follows:

My name is B. F. Cake; 41 years of age; residing at Renton, Washington; plant superintendent for the Denny-Renton Clay & Coal Company. I have charge of the plant at which Heath Unit Tile are manufactured.

Q. Are you at the present time engaged in the processes of manufacturing some of this tile?

A. Yes.

Q. How long has your company been engaged in this manufacture?

A. About six to eight months.

Q. Do you know why your company took up the manufacture of this tile?

A. Owing to its load-bearing qualities and simplicity of wall construction. I regard Heath tile superior to other tiles which I have seen or know of. Since we started the manufacture of the Heath unit tile, we have made approximately 250,000 double units, together with the necessary singles and other shapes for same. I was taken into consultation concerning the advantages of manufacturing these tile. The Heath tile dies were represented to be balanced units, which we have found them to be. That is, that the ware can be made, dried and burned with a minimum loss. That has been our experience. Aside from starting new dies, our drying loss under average conditions has not exceeded 2%. We find that our equivalent in cubic feet of wall capacity of Heath tile is equal to that of brick, with the same

(Deposition of B. F. Cake.)

power required. The maximum output of our machine is 15,000 Double Unit Heath Tile, or the equal of 90,000 shale face brick in eight hours. For cubic feet of [55—35] wall capacity, we find that it requires less labor to handle Heath tile than brick. The saving as applied to the making amounts to approximately 30%; to setting 40%; to burning approximately 30% including labor and fuel. We can burn Heath tile approximately from 40% to 50% quicker than brick depending upon weather conditions. The only pictures or illustrations of the plant where these tile are made that I can conveniently give you is a cutting from our catalogue, which I now hand you. The plant is in the middle of the page.

(This cut is offered in evidence and notary is requested to mark same "Plaintiff's Exhibit 'BB,' Picture of Denny-Renton Clay & Coal Company Plant, Renton, Washington.")

(Direct examination closed.) [56—36]

**Deposition of E. Zimmerli, for Plaintiff.**

E. ZIMMERLI, a witness called to testify in the above-entitled cause in behalf of the plaintiff, after having been first duly cautioned and sworn, in answer to interrogatories propounded to him by Mr. MACKLIN, testified as follows:

My name is E. Zimmerli; age, 40; 151 Cowper Street, Palo Alto, California; construction engineer. I have been in the game for over 20 years. In 1917, I built shipyard of G. M. Standifer Construction Corporation, Vancouver, Washington; buildings and



(Deposition of E. Zimmerli.)

ways at a total expenditure of approximately two and one-half million dollars. In 1918, night superintendent of the Los Angeles Shipbuilding and Drydock Co. 1920, chief engineer for the Foundation Company, building new mechanical shops for the Standard Oil Company at Richmond, California. Total expenditure of two and one-half million dollars. Buildings consisted of reinforced concrete hollow tile and timber. In the course of this work it is necessary for me to be intimately familiar with various forms of wall construction material, and particularly hollow tile wall constructions of different kinds. I know the Denison, Johnson and National fireproofing type of tile. I have had experience in laying any of those tiles.

I recently had occasion to construct buildings using the Heath system of wall construction with the Heath tile, for the Foundation Company on the buildings for the Standard Oil Company at Richmond. All shop buildings were designed for future additions; all such buildings were to be of hollow tile construction and after due investigation, we decided on Heath tile. I have personally laid tile and brick, and I know that a bricklayer interested in his work, giving the same amount of energy to laying Heath tile to the laying of brick will be able to lay 500 or more tile in an 8 hour day, being equivalent to 3,000 brick. [57—37]

That would not be true of Denison or other forms of tile. To my knowledge only the Denison and Heath tile have been used here, Denison tile on ac-



(Deposition of E. Zimmerli.)

count of two surfaces to be fitted at one time could not be laid as fast and as even as the Heath tile. If the bearing surfaces of the Denison tile are not mortared or plastered evenly, then the wall plastered or unplastered will crack in due time, and of course the bearing surface of such wall will be impaired through the said uneven fittings, because this uneven fitting will throw the vertical webs out of alignment, where as in Heath tile, with the even horizontal mortar bed you can't *to* wrong and are bound to get the right bearing surface there. For the same reason the spacing of the webs in the tile brings them automatically into alignment. I will make a sketch illustrating the points just made, of the two mortar beds for each course of tile with the Denison construction, and a single mortar bed and vertical alignment with the Heath construction.

(Witness makes a sketch.)

By Mr. MACKLIN.—This sketch is offered in evidence and the notary is requested to *make* same “Plaintiff’s Exhibit Zimmerli Sketch.”

“Q. In your experience as an engineer, would you consider the design of such a system of wall construction to be something which any engineer or mechanic could do if called upon for something which required ingenuity and study, amounting to invention?

A. I think it is an invention. It required study in order to do that. It is all very easy to say after you have seen a thing that anybody could do it.”

(Deposition closed.) [58—38]

**Deposition of Carl C. Walters, for Plaintiff.**

CARL C. WALTERS, a witness called to testify in the above-entitled cause in behalf of the plaintiff, after having been first duly cautioned and sworn, in answer to interrogatories propounded to him by Mr. MACKLIN, testified as follows:

**Direct Examination.**

My name is Carl C. Walters; age, 36; residence, Zanesville, Ohio; manager of the Harris Brick Company.

I entered the clay products industry in 1905 with the Hydraulic Pressed Brick Company at Philadelphia. For three years I was salesman and for four years I was employed in one of their yards in Brazil, Indiana, getting some factory experience, doing actual brickyard labor, and for one year I was employed by the same company as superintendent of a factory in St. Louis. I then resigned to take a position as manager of the Hocking Valley Products Company, Columbus, Ohio, from which position I resigned to take the general managership of the Fultonham Texture Brick Company, Fultonham, Ohio. From there, on account of illness in the family, I went to Los Angeles, and went to work in the Los Angeles Pressed Brick Company as assistant to the president. I remained there for a year and a half, part of this time in the service of the Government, inspecting and expediting shipments of hollow tile to one of the Government hospitals. On completion of my services with the Government, I came back east and took my present position.

(Deposition of Carl C. Walters.)

I have been interested in various forms of hollow tile throughout my experience in the clay products industry. The ordinary building tile of a dimension 8x12x12 or various sizes does not appeal to me from a building standpoint. The Denison, Natco, and other forms of hollow, building, wall tile appeared too complicated for practical and economic usage. In accepting the position with the Los Angeles Pressed Brick Company, I was [59—39] immediately put in charge of the Hollow Tile Department, and they were at that time face to face with the proposition of securing a new form of patented hollow tile to manufacture. My attention was called to an advertisement of Heath unit tile, carrying some cuts, and the efficacy and simplicity from a building and manufacturing standpoint was at once apparent. We negotiated a license arrangement with Mr. Frederick Heath and proceeded with the manufacture and sale.

The tile not only proved to be all that could be desired from a manufacturer's point of view, but it also filled the wants and the demand of the trade of the Los Angeles Pressed Brick Company.

The Heath tile has its advantage in manufacture in that it is a uniformed shaped tile, and that it has the added strength in the green ware by the double web, which occurs in the center of the tile. The die for forming the tile is very simple, and by reason of the fact of the strength of the tile, there is no breakage whatsoever after leaving the mouth of the machine on the conveyor belt through the cutter.

(Deposition of Carl C. Walters.)

The setting on cars with the most tile means a breakage of a percentage, and in fact the entire handling of them through the kilns, out of the kilns to the yard, or to the car, and still further to the job and in the scaffold. It is as simple to handle Heath tile as handling common brick, there being no more waste, and by reason of the fact of their being a larger unit, there is not as much waste, for green brick of standard size breaks easily with the slightest provocation. The double web in the center of the tile is the secret of it. It adds strength where strength is needed. The tile being of uniform size, dries and burns of a uniform size and is laid in the wall in the same manner as brick are laid, interlapping and bonding. The uniformity of size has its telling effect in thus constructing a wall. [60—40]

The Natco tile (Johnson) stands on edge and the bearing on the mortar is therefore problematical. It may or may not have mortar on the central webs.

The Denison tile has two beds of mortar and the unusual shape of it causes an unusual shrinkage, and this shrinkage is apt to be at any angle other than at right angles, thus making it necessary to build up the tile with mortar to a straight line, which not only takes time, but is not a sure process.

It was demonstrated that the Heath tile could be laid much cheaper than could the Denison or the Denison Heavy duty tile on the Government work at North Island. This fact was demonstrated on this Government work and it resulted in the Los Angeles Pressed Brick Company securing the order



(Deposition of Carl C. Walters.)

for the Government's requirements.

The comparison with ordinary tile is wrong for the Heath possesses more strength. It is not my opinion that the Heath tile possesses more strength than the Denison or Natco, but by reason of its shape lays up with more strength. In other words, the wall is stronger and the alignment of webs is more certain. You are sure at all times of getting one hundred per cent efficiency in strength quality with the Heath tile.

“Q. In your experience in building tile constructions, and how the different forms came to be used, do you consider the Heath tile to constitute an advance in the art of masonry, or would it in your opinion be something which any mechanic might make if called upon?”

“A. At this date my reply is emphatically, ‘Yes.’ On first inspecting the tile my thought was, why had it not been made and used in the Heath system of wall construction before. The first casual glance revealed its adaptability, but on going into it, I realized that it required a good deal more than an average brain to figure it out, and the more thought given to it, the more convinced one is that it is an invention of the first hand.” [61—41]

My enthusiasm on this Heath tile question is so keen that I am hopeful of some time devoting my entire time to the disposition of it. I have many friends in the selling end of clay products in the eastern and middle-western states whom I know will sincerely appreciate securing the Heath tile for



(Deposition of Carl C. Walters.)

their customers, and my actual experience has convinced me that the tile has but to be shown to the building public to spell its success. In presenting Heath tile wall construction to Mr. Richard S. Requa, Government Architect at Rockwell Field, North Island, San Diego, I presented them to a man who had used various forms of hollow tile and at almost a glance he enthusiastically said, "That is the tile we want," which resulted in the contractors placing an order for their vast group of buildings. These tile were used in all the buildings constructed on North Island by both Army and Navy, with the exception of two minor buildings, which, at my suggestion, were laid up of Denison and Denison Heavy Duty Tile for the purpose of getting cost comparisons. These two buildings were laid up shortly after construction started, and Heath tile were used on the remaining buildings, which fact is very significant. I will also add that in presenting them to architects, I have often heard the remark, "I don't see why somebody hasn't thought of this application of a tile to a wall before this."

(Deposition closed.) [62—42]

**Deposition of Harlow B. Potter, for Plaintiff.**

HARLOW B. POTTER, called as a witness in behalf of the plaintiff, after having been first duly cautioned and sworn, in answer to interrogatories propounded to him by Mr. MACKLIN, testified as follows:

(Deposition of Harlow B. Potter.)

Direct Examination.

(By Mr. MACKLIN.)

My name is Harlow B. Potter; age, 36 years; residence, 2125 3rd Avenue, Los Angeles, California; occupation, secretary of the Los Angeles Pressed Brick Company, engaged in the manufacture of various clay products. This patent 1215149 shows the Heath patent hollow wall construction. The illustration shows how these walls are constructed and also one of the tile units. We manufacture the Heath tile under a license agreement with the Heath Unit Tile Company in accordance with the disclosures of this patent. We manufacture and are selling tile for this wall construction at the present time and find that this is a valuable part of this business. This construction is very favorably received by architects, contractors, builders and others. We have manufactured Denison interlocking tile as well as regular straight wall tile and the demand for Heath tile for wall construction is greatly in excess of that for any other interlocking or special wall tile being used in this vicinity. I am not a technical man, but the general reasons for the favorable and extended use of this tile, in my opinion, are the simplicity both of the manufacture and usage of this tile, their strength when built into the wall on account of the alinement of the clay webb. In short it is more simple to make, more simple to lay, and lays up at less cost and does not sacrifice the interlocking feature of the Denison or other wall tile. Here, for example, is our new catalogue we have just received from the printer.

(Deposition of Howard Frost.)

By Mr. MACKLIN.—This catalogue is offered in evidence and the notary public requested to mark the same [63—43] Plaintiff's Exhibit "FF."

**Deposition of Howard Frost, for Plaintiff.**

HOWARD FROST, called as a witness in behalf of the plaintiff, after having been first duly cautioned and sworn, in answer to interrogatories propounded to him by Mr. MACKLIN, testified as follows:

Direct Examination.

(By Mr. MACKLIN.)

My name is Howard Frost; 37 years; 1526 Fourth Avenue, Los Angeles; president of the Los Angeles Pressed Brick Company. I am familiar with the various forms of hollow tile now in use in this vicinity and throughout the country. Patent No. 1215149, shows a Heath hollow tile wall. The illustrations show a cross-section of wall built of Heath hollow tile.

Q. "Have you ever manufactured and built other forms of hollow tile?"

A. "We have. We manufactured a tile known as Denison tile, and also all common forms of hollow tiles. Of these tiles we consider the Heath the best from the manufacturers' and builders' standpoint?"

Q. "Please state briefly your reasons for considering Heath tile and its wall construction the best."

A. "First, from the manufacturing standpoint, the tile are much simpler in all processes of manu-

(Deposition of Howard Frost.)

facture. From the structural standpoint, the tile are more quickly assembled in the wall, which effects a considerable economy as compared with laying common brick or Denison tile. Another feature which is considered of great importance by architects and engineers and builders is the reinforced web and shell members of the tile, due to its vertical alignment. The even, horizontal mortar beds create an architectural value in exterior finish as well as lending to simplicity in laying the tile." [64—44]

We are licensees under this patent, and we are manufacturing Heath tile in very large quantities at our Alberhill and Santa Monica factories. Here are illustrations showing these plants just mentioned.

Mr. MACKLIN.—These illustrations are offered in evidence, and the notary is requested to mark them, respectively, Plaintiff's Exhibit "G-G," the Alberhill Plants, and Plaintiff's Exhibit "HH," the Santa Monica Plant.

We have been manufacturing Heath tile since the fall of 1917. Until February of 1920 we were manufacturing Heath tile at the Alberhill plant only, and since February of 1920 we have been manufacturing at both plants. A very large increase in the demand and production of Heath tile was effected during 1919 and 1920, which has very largely replaced both Denison tile and common brick. The former has not been manufactured in commercial quantities for the last six months or more. We



(Deposition of Howard Frost.)

have manufactured and sold approximately 16,000 tons of Heath hollow tile from January 1st to September 30, 1920, inclusive. In this connection I wish to say that due to lack of capacity, we were compelled to decline a large amount of business, which otherwise would have amounted to at least fifty per cent more than we have done in said period. 16,000 tons of tile represent somewhat over a million and a quarter double units of Heath tile.

Q. "Have you any illustrations in the nature of photographs, sketches, drawings and the like of buildings actually constructed in this vicinity of Heath tile manufactured by you?

A. Many of such. This list includes residences, fruit-packing houses, churches, schools, garages, store buildings, and the like."

The WITNESS.—In practically all these structures the walls are load-bearing. You may take a number of these sketches and newspaper illustrations for exhibits. There are many more of them, but there would doubtless be considerable repetition. [65—45]

Here are ten copies of photographs of structures, mostly in the course of construction, which photographs we have had made to illustrate the successful use of the tile and the wide variety of building to which it is adapted. These photographs were made by Mr. LeRoy Hulbert, of Los Angeles, who makes such photographs for us frequently, but who, owing to sickness, is behind in his work, and there are considerable number of structures we would



(Deposition of Howard Frost.)

like to show which he has not yet had the opportunity to photograph.

Q. You may have this editorial in the "South-west Builder and Contractor" as an exhibit.

Mr. MACKLIN.—This page 11 of the "South-west Builder and Contractor," of November 12th, is offered in evidence, and the notary is requested to mark the same Plaintiff's Exhibit, Published Editorial, "MM."

The WITNESS.—It will be noted in this article that factors of safety are mentioned and references made to tests for safe loads. We find by experience that the walls are actually capable of much greater loads, even at the same factor of safety.

Mr. MACKLIN.—These illustrations are offered in evidence, and the notary is requested to mark the sheaf of illustrations as Plaintiff's Exhibit "II."

The WITNESS.—I personally consider the Heath tile wall construction to be an invention. Our experience with the building trade is such that we realize that to construct a wall of this kind requires more than ordinary mechanical skill or experience in building, and it appears to be the result of study and ingenuity of a high order.

(Deposition closed.) [66—46]

### **Deposition of John Parkinson, for Plaintiff.**

JOHN PARKINSON, called as a witness in behalf of the plaintiff being first duly sworn, in answer to interrogatories propounded by Mr. MACKLIN, testified as follows:

(Deposition of John Parkinson.)

Direct Examination.

(By Mr. MACKLIN.)

My name is John Parkinson; 58 years of age; residence, Los Angeles; architect; I have been practicing in Los Angeles for 26 years. I am familiar with the wall construction known as Heath unit tile. I have specified it, and I built a portion of my own house of Heath tile. It gives a good bond, and the size and shape of the tile is such that it is very efficient.

(Deposition closed.) [67—47]

**Deposition of F. A. Harrison, for Plaintiff.**

F. A. HARRISON, called as a witness in behalf of the plaintiff, being first duly sworn, in answer to interrogatories propounded by Mr. MACKLIN, testified as follows:

Direct Examination.

(By Mr. MACKLIN.)

My name is F. A. Harrison; 45; 1522 Fourth Avenue, Los Angeles; general manager of the Los Angeles Pressed Brick Company. Our company is licensee under Heath patents, and we are manufacturing the tile and selling it at the present time, and have been since the fall of 1917. We have manufactured the usual forms of hollow partition tile and the Denison patented tile. I am familiar with the so-called Johnson tile wall construction through their advertising. Previous to my connection with the Pressed Brick Company I was with the C. J. Kubach Company, general contractors, of

(Deposition of F. A. Harrison.)

Los Angeles. I was with the Kubach Company about five years, and previous to that I was with the Los Angeles Investment Company three years, during which time we erected a 13-story office building at Eighth and Broadway and the Trinity Auditorium on Grand Avenue, a million-dollar structure, being general superintendent of both jobs. Before that I was with Parkinson & Bergstrom, architects, of Los Angeles, for a period of between five and six years, during which time I was general superintendent of their work in Los Angeles and vicinity. There are many advantages in the use of the Heath tile that were very apparent to me from the first time I saw it used. The great advantages of this tile over the other forms of patented wall tile that had been upon the market were so apparent that the contractor would only consider the Heath tile upon repeat orders. This was especially true in comparing with the Denison tile, which had been thoroughly introduced and had been used in this vicinity.

Q. "Are special instructions required to bricklayers to [68—48] accomplish the vertical alignment of webs and even courses in laying up one of these walls?

A. No, because the sizes and proportions of the tile lay naturally with the webs in perfect alignment."

Some of the other patented tile are referred to by the trade as interlocking. As I understand this, interlocking usually refers to offset tile, for instance, a tile of a "T" shape or a "Z" shape. It

(Deposition of F. A. Harrison.)

has been my experience, however, that the so-called "T" shape tile are not interlocking in the sense that the tile cannot be removed from the wall without displacing the tile adjoining. I believe the word "interlocking" has been applied to these tile more with the view of the sales value of the word than because of any practical feature of it. I believe Heath tile is bonded better than any other interlocking tile, as it does not depend on thin strips of mortar to hold it together, but has a full bed of mortar the full width of the wall. From my experience in wrecking hollow tile walls, I am thoroughly convinced that the mortar used in a hollow tile wall is of vital importance to the strength of the wall, and that any reduction of the width of the bed is detrimental to the strength of the wall.

After the introduction of the Heath tile, we found the demand growing beyond our expectations, so much so that we were entirely swamped with orders, our customers much preferring it to the Denison Company; and on account of its great practicability we were unable to make delivery upon our orders, and had to take orders only upon ninety days' delivery, and even found we could not make delivery in that time. The demand for Heath tile has kept up steadily, even when the demand for the common partition tile dropped off somewhat. We are at present far behind on our orders for Heath tile. I would say that the cost of manufacturing the Heath tile is much less than we can manufacture the Denison at the present time. The Denison



(Deposition of F. A. Harrison.)

or any other tile with offsets [69—49] is much harder to handle and manufacture than the Heath. It is also easier to handle the Heath in shipping than tile with offsets, and we have less breakage also. One big advantage in the manufacture of Heath tile is that we only have two dies, one for the wall tile and the other one for the corners of jamb tile. This wall tile die used for the full  $8 \times 5\frac{1}{2} \times 11\frac{1}{2}$  tile, and also for the half-tile. By placing a wire across the face of the same die, we manufacture the so-called  $4 \times 5\frac{1}{2} \times 11\frac{1}{2}$  tile. Also with the same die we make the tile known as the one-half double unit. In this way we are enabled to run the three sizes of tile with the same die, and all in a short space of time, thereby bringing the tile of each size in the same kiln with no difficulty, and enabling us to make immediate shipment from the kiln when cooled off, filling orders containing each size of tile required to build a structure.

We had considerable difficulty introducing the Heath tile on account of the thoroughly established condition of the Denison tile in our market. I firmly believe if it had not been for the extreme practicability of the Heath tile, we would have been unable to have placed the new tile upon the market with anything like the success we have had with the Heath tile. I also know from personal experience that one reason for the large sales of Heath tile has been on account of the practicability of the tile, and that these tiles have displaced many frame structures that would have been built, and also com-



(Deposition of F. A. Harrison.)

mon brick buildings have been changed to Heath tile, where brick was specified. I believe it to be much stronger than any other wall tile. This is based on tests our company had made by the University of California at Berkeley and by the Bureau of Standards at Denver, Colorado. Page 9 of our leaflet on the Heath tile has a record of these tests. [70—50]

MR. MACKLIN.—This page from the Heath advertising leaflet is offered in evidence, and the notary is requested to mark the same Plaintiff's Exhibit "JJ."

MR. MACKLIN.—One of these complete leaflets is offered in evidence, and the notary is requested to mark the same, Los Angeles Pressed Brick Company leaflet, Plaintiff's Exhibit "KK." [71—51]

**Deposition of Herbert J. Simon, for Plaintiff.**

HERBERT J. SIMON, a witness called to testify in the above-entitled cause on behalf of the plaintiff, in answer to interrogatories propounded by Mr. MACKLIN, testified as follows:

My name is Herbert J. Simon; 34; 524 West Forty-fifth Street; salesman with the Los Angeles Pressed Brick Company.

Q. Have you sold hollow building tile of any kind?

The WITNESS.—I have sold partition tile, fire-proofing, and Heath tile. Heath tile has the advantage of being laid up in a solid bed of mortar, making a more substantial wall construction. The

(Deposition of Herbert J. Simon.)

alignment of webs give it a better bearing strength. The three air spaces in a single unit give it a thermic effect. The fact of the three air spaces makes it a wall that has better insulation than partition tile or ordinary two-void tile. From the viewpoint of the mason and my interviews with masons who have handled both kinds of tile, they prefer this tile. They are easier to handle and not so cumbersome. It lays up with brick veneer or facing, and is easily bonded in with brick veneer or facing. In cutting chases in the walls for electrical conduits or pipe, the tile is not materially weakened for the simple reason that it has that double web in the tile, which straightens the wall, which ordinary partition tile does not have; and when the chase is cut in an ordinary partition tile, it tends to weaken that tile. [72—52] The advantage of this tile over patented tile such as the Denison tile is its simplicity. It does not require a great number of units to build a wall of any size or shape. After the tile is in the wall, it lays up to truer and straighter lines than the ordinary partition tile. The surface of Heath tile does not warp as much in comparison as a 12x12 surface of the other tiles, and therefore requires less plaster in the finish, both inside and outside of the wall.

I have sold a great deal of tile to be exposed for exterior finish, both in residence and factory construction. Heath tile can be sold for outside finish because it is adapted for any style of architecture, for example, in the old English style of

(Deposition of Herbert J. Simon.)

home. The old English style of home can be carried out in substitution of brick and can be worked in with brick. We find it adapted to Spanish architecture on account of its color and texture. From the viewpoint of economy, the plastering of the exterior is quite an item, and the difference in the cost between smooth faced and the scored tile is very nominal, compared with the plastering. We are not pushing this smooth-faced tile because we cannot fill the orders that we have. We have a data sheet showing the exact cost of Heath tile in a wall and the exact cost of brick in a wall.

Mr. MACKLIN.—The cost sheet is offered in evidence, and the notary is requested to mark the same Plaintiff's Exhibit "LL."

The WITNESS.—I am changing the notations of the price of brick, because the printed cost is an old price. This brick is based on a very liberal estimate. We based a day's work on 2,000 brick, but most of the master brick masons would like to know where they can get a brick mason that would lay 2,000 brick a day. [73—53] They only lay about 1,500. We based it on the old labor schedules of 2,000 brick a day. As a matter of fact, the tile can be laid into the wall approximately ten to twelve per cent cheaper than brick, in this locality.

**Deposition of Earl B. Newcomb, for Plaintiff.**

EARL B. NEWCOMB, a witness called to testify in the above-entitled cause on behalf of the plaintiff, having first been duly cautioned and sworn, in answer to interrogatories propounded by Mr. MACKLIN, testified as follows:

Direct Examination.

(By Mr. MACKLIN.)

I am Earl B. Newcomb; 39; 221 North Berendo, Los Angeles; contractor and engineer. I am thoroughly familiar with the Heath system of wall construction. I have studied the tile as laid into a wall, and its advantages with reference to other hollow tiles. In connection with my engineering work, such knowledge is essential. I used Heath in the Pantages Theater and office building. It was used as a curtain wall, between the stage portion of the theater and the offices, on Seventh Street, which is recognized by the local ordinances as a fire wall, ordinarily requiring brick construction. On account of the numerous webs and advantages of bond, I was able to convince the building department that it was the equal of a brick curtain wall, and obtained their permission for the substitution. My advantage in this case was the cheap price of tile per cubic foot and the ease and facility of laying, the cost of which, including the mortar, does not exceed about 60 per cent of laying brick under the same conditions. In addition to this, it reduced the dead load on the concrete [74—54] frame 50



(Deposition of Earl B. Newcomb.)

per cent of cubic foot of wall. Owing to the numerous vertical webs and the dead air spaces, I consider it a better fire resistant than a solid brick wall. Partition tile would not compare with it at all as an insulator. The dead air spaces are not to be found and are not possible in the ordinary partition tile. The ordinary hollow tile is not considered as a structural material in any sense of the word. It is for use only as a filler wall. On the other hand this Heath material, owing to the peculiar design of the blocks, whereby the vertical webs in every case come in alignment, is entirely practical as a structural material for use in bearing walls where ordinarily brick would be used. Denison hollow tile costs more to lay on account of the variety of shape of blocks, such as starting tiles, finishers, half tiles and special shape jamb tiles, that you have to have handed to the mason on the scaffold at all times. My experience has been that a mason wastes considerable time in hunting around for the particular shape block that he wants to use.

**Deposition of Percy G. Anderson, for Plaintiff.**

PERCY G. ANDERSON, a witness called on behalf of the plaintiff, being duly cautioned and sworn, testifies as follows:

**Direct Examination.**

(By Mr. MACKLIN.)

My name is Percy G. Anderson; age, 41 years; residence, 1419 N. New Hampshire Street, Los Angeles; occupation, general building contractor. I



(Deposition of Percy G. Anderson.)

know the Heath system of building walls of hollow tile. I have used Heath tile in the construction of buildings for example, one of these is the Congregational Church at Hollywood. There was a picture of this in last week's "Southwest Builder and Contractor" at page 10. [75—55]

By Mr. MACKLIN.—Page 10 of the "Southwest Builder and Contractor" is detached and offered in evidence and the notary requested to mark the same as Plaintiff's Exhibit "NN."

I find Heath hollow tile convenient and economical to lay and makes a satisfactory load-bearing wall and of very satisfactory appearance, also is effective insulation. In this picture of this Hollywood building (Plaintiff's Exhibit "NN") some of the corners are built with brick. This was done because the brick company was unable to deliver sufficient Heath tile to finish the job and it works out very nicely to use brick at the corners because of the relative size of the tile and brick. I hope to continue to use Heath tile.

(Deposition closed.)

**Deposition of P. C. Knudsen, for Plaintiff.**

P. C. KNUDSEN, being duly cautioned and sworn, deposes and says in answer to interrogatories propounded to him by Mr. MACKLIN as follows:

Direct Examination.

(By Mr. MACKLIN.)

My name is P. C. Knudsen; age, 38; 1221 Solano

(Deposition of P. C. Knudsen.)

Avenue, Vallejo, California; masonry contractor. I am familiar with various forms of hollow tile, and have used Heath system of building walls of hollow tile. Plaintiff's Exhibit "DD" is the Presbyterian Church that I built under the supervision of Mr. Starbuck, architect, at Marin and Caroline Streets, Vallejo, California, using Heath unit tile. I have studied the advantages of various forms of hollow tile and I consider the best is the Heath unit tile, because [76—56] it is easy to handle for the bricklayer and the laborer and it makes a good strong wall, can easily be substituted for iron lintels over the windows and easy to finish corners and offsets. It is a strong wall because the vertical webs all come in line; in a 12" wall you have six straight bangs (webs) over one another. This is not true of other hollow tile I know of in the same good way that the Heath tile is. (Witness makes a sketch illustrating the arrangement in the Heath hollow tile, and marks on the sketch the size of the wall.)

Here we have one web to support two, and here we have two webs to support one. (Witness indicating on sketch.) In this 12" wall we have four straight vertical webs right above one another inside the wall, which shows it carries an equal weight and makes a stronger wall.

By Mr. MACKLIN.—This sketch is offered in evidence and notary is requested to make same Defendant's Exhibit "EE," Knudsen Sketch.

I am familiar with the Denison tile. I have laid

(Deposition of P. C. Knudsen.)

them myself. I prefer to use Heath tile, because it will make a stronger wall and it is easier to handle. I am recommending it now for the Baptist Church at Vallejo and a couple of other buildings in Vallejo. In increasing a wall from 8" to 12", or 12" to 16", or 16" to 20", you have a full level mortar bed throughout the wall, which you would not have in any other interlocking tile. The different thicknesses of wall work out very easy. In an 8" wall you have one double unit, in a 12" you have one double and one single, in a 16" two double and in a 20" wall two doubles and one single. In all these walls you have alternating bond throughout.

(Photograph of Presbyterian Church, Vallejo, California, referred to by witness is offered in evidence and the notary is requested to mark the same Plaintiff's Exhibit "DD," Church Built of Heath Tile.) [77—57]

**Deposition of John R. Gwynn, for Plaintiff.**

JOHN R. GWYNN, being duly cautioned and sworn, deposes and says in answer to interrogatories propounded by Mr. MACKLIN as follows:

My name is John R. Gwynn; age, 49; 3868 Jackson Street, San Francisco; manager, N. Clark & Sons, San Francisco, California.

"Q. In the course of your work and dealings as manager of N. Clark & Sons, have you had occasion to use, sell or otherwise deal in Heath tile and wall construction?"

"A. Yes, very frequently. N. Clark & Sons are

(Deposition of John R. Gwynn.)

licensed to manufacture or have manufactured for them Heath tile and sell them in all forms and for various kinds of walls. We are pushing the sale of this tile at every opportunity.”

We became interested in the Heath hollow tile first from a manufacturing standpoint, because the pattern would facilitate simple and economical production and at the same time meet every need in wall construction. I have studied the mechanical characteristics of the tile forms and the effects when laid up into the wall. The advantages are,—economical to manufacture, easy to handle and the simplicity of the construction principle, thus making it very easy for brick masons to use without special instruction, as the tile work to the same conditions in wall construction as established for brick. The alignment of webs one over the other is automatically obtained without complication and the necessity of using various shaped tile, as is the case with other makes.

“Q. Do you consider the design of the Heath tile system of wall construction to be an invention or within the province of the ordinary mechanic?”

“A. The tile are ingenious to say the least. Until Mr. Heath’s inventive genius was brought to bear, the building world had no such means of wall construction in hollow building tile. It has been regarded as an advance in the art of better masonry.” [78—58]

“Q. Have you any photographs or like evidence of actual buildings in which the Heath tile has been



(Deposition of John R. Gwynn.)

used through your business efforts?

“A. Yes, many.”

“Q. Please show me some of these photographs for use in this record, showing specific uses or advantages.”

The WITNESS.—Referring to Exhibit “CC,” this picture is a reproduction of an apartment house in San Francisco at Eddy and Jones Streets, the upper story of which was constructed entirely of Heath tile. When the owners desired to add this additional story, the architects and engineers discovered that the original steel frame and walls of the original building would not support an additional story if constructed of additional steel work and brick walls. Heath unit tile made it possible to add this additional story, because it was 40 per cent lighter than brick construction, and it would meet with the city ordinances and inspector’s requirements, and sustain the load of the roof and other stresses incident to construction.

This picture (Plaintiff’s Exhibit “DD”) is of the Presbyterian Church at Vallejo, California. It is noticeable in the design of the facade of this building that it required a tile that would be adaptable to the many features of construction, such as the different offsets or breaks in exterior wall, size and position of windows. It will also be noticed that the walls in which tile were used in this edifice are load-bearing walls. [79—59]



**Deposition of Thomas M. Ward, for Plaintiff.**

THOMAS M. WARD, being duly cautioned and sworn, deposes and says in answer to interrogatories propounded by Mr. MACKLIN as follows:

I am Thomas M. Ward; age, 50; 1260 California Street, San Francisco, California; assistant district engineer for the Foundation Company, San Francisco. I am familiar with various wall construction materials, including hollow tile, and I know the Heath system of hollow tile wall construction. I have specified it and used it in construction work. It is simple, affords good load-bearing characteristics and is more easily handled than other patented tile on the market. Naturally, I have studied it in order to have used it. It has a peculiar arrangement of internal webs, which produces a vertical alignment of the internal as well as the external webs in various thicknesses of wall. Its simple exterior permits it to be laid without special instructions to brick masons. I expect to continue to recommend the use of this tile whenever opportunity presents, provided the manufacture keeps up with the demands and can supply materials when required.

(Deposition closed.) [80—60]

**Deposition of G. D. Clark, for Plaintiff.**

G. D. CLARK, being duly cautioned and sworn, in answer to interrogatories propounded by Mr. MACKLIN, says as follows:

My name is G. D. Clark; age, 62; Menlo Park,

(Deposition of G. D. Clark.)

California; secretary-treasurer and general manager of N. Clark & Sons, San Francisco, California. Our business is the manufacture of clay products, such as architectural terra cotta, pressed brick, vitrified pipe, hollow clay tile and other kindred products. We have been engaged in this business about 45 years. Through my association with the manufacture of clay products, I have had opportunity through various channels to become acquainted with many inventions relating to the use of clay products. I know of the Heath hollow building tile wall construction. We are licensees under the Heath patents. In the past ten years we have been in search of a hollow building tile, the pattern of which would be easy and economical to manufacture and at the same time meet every need in wall construction. Several patented tile were presented for our consideration, among which were the Hercules, Hun, Denison and others, but in each instance their impracticability was manifest and in consequence abandoned. Within the last two years we learned of the Heath building tile and found that it possessed the requirements of a tile for which we had been searching, and we thereupon obtained exclusive right to manufacture and sell Heath tile in Northern California and the Hawaiian Islands.

The shape and size of the two tile make it economical to manufacture and the two tile are made by the same die. There is less waste in handling, drying and burning. This results in a larger out-

(Deposition of G. D. Clark.)

put of marketable tile produced by a plant. In this regard there is a marked advantage over an angular shaped tile, or a tile wall construction that requires many shapes. Simplicity is its great advantage. The shape of the tile is such that it resists breakage in handling and shipping. It being 40 per cent [81—61] lighter per cubic foot than common brick makes an equivalent saving in railway and cartage costs.

The adaptability of the double and single tile with the interlocking bond, as laid in the wall, meets the measurements and methods as established by brick work, thus making it easy for brick masons to use, and without special instruction. The various thicknesses of walls built with Heath tile are the same as established for brick. It is these simple features of the Heath tile construction that make it cheap and practical. The alignment of webs one over the other produces a strong wall with minimum weight. It is regarded as an advance in the art of better masonry, as it has the required strength, produces a dry wall, gives good insulation against heat and cold, and at less cost than any other construction. Its simplicity makes it essentially practical.

(Read over and signed by witness.) [82—62]

**Deposition of Harry E. Drake, for Plaintiff.**

HARRY E. DRAKE, being duly cautioned and sworn, deposes and says in answer to interrogatories propounded by Mr. MACKLIN as follows:

**Direct Examination.**

(By Mr. MACKLIN.)

My name is Harry E. Drake; age, 39; 1333 Lincoln Way, San Francisco, California; masonry contractor. I have studied the characteristics of the Heath tile and I consider Heath tile the simplest and it makes the strongest wall of interlocking tile that I have ever used or have seen. An interlocking tile in my estimation is an interbonding tile where every course bonds with the course above and below across the wall.

I built eight buildings for the Government at the Naval Air Station, Rockwell Field, San Diego, California, and also a theatre at Vallejo, California, and several other small jobs in San Francisco. At San Diego the building was specified in ordinary hollow building tile and was changed to Heath tile on account of the use of these tile on the Army Buildings at the same place, which the engineers and officers in charge considered better construction than the ordinary tile. At Vallejo and also on a building in Oakland, the same architect used Heath tile in preference to brick on account of the load saving on the concrete beams and curtain walls and the saving of reinforced steel throughout the building. In the eight buildings at the Naval Air Station, I used approximately 200,000 Heath tile.



(Deposition of Harry E. Drake.)

The tile are very simple to lay and a saving in mortar and easier to handle. We have no difficulty in gaining the alignment of the webs in the use of Heath tile, none whatever; that is taken care of in the design and arrangement of the tile. [83—63] Patent 1215149 granted to Frederick Heath shows the constructions of the wall as I have laid them. It is exactly as they are laid and the only way they can be laid. One of the advantages of Heath tile is that there are practically only two different units you can build a building with, there being no complications whatever. You can use the whole unit and split it for half and a corner tile is the only other tile you have to use in the whole construction of a building.

Q. "Do you consider the design of the Heath tile wall to be something within the province of the ordinary mechanic?

A. I do not. I consider the tile is quite an invention, because I have never seen anything like it before that added to the strength of the building and was as simple. The connecting webs one over the other is a work of art alongside the other tile, because none of the other ordinary tile I have seen have webs that bear and that take care of the mortar joint and overrun like the Heath tile do."

(Deposition closed.) [84—64]



**Testimony of Frank Barnes, for Plaintiff.**

FRANK BARNES, a witness called on behalf of the plaintiff, testifying as to the Emanuel Hospital wall (in Portland suit) said, "I never paid much attention to whether the vertical webs were staggered or not."

Cross-examination.

(By Mr. GEISLER.)

COURT.—I think these photographs of the Emanuel Hospital walls show the webs are staggered.

Mr. GEISLER.—I should like to object on the ground they are contradicting their own witness.

COURT.—There is an end view that shows they are staggered. That is the only end view there is.

Witness excused.

Several witnesses called on behalf of the plaintiff testifying as to the Emanuel Hospital wall and other walls made of Columbia Brick Works tile, said that the inner webs would be staggered, particularly if the walls were twelve inches thick as in the Emanuel Hospital walls. For example, A. J. Bingham, testifying as to a garage built in Portland, Oregon, of building blocks purchased from the Columbia Brick Works and refers to Plaintiff's Exhibit, Photograph 17, says the inner webs are staggered but the outside ones are practically over each other, and further says these walls were twelve inches thick. The Court asks now if you made these two center webs vertical, then you would have more

(Testimony of A. Grieve.)

than a twelve-inch wall. Ans. "You couldn't get them."

(Plaintiff's Exhibit 17, above mentioned, was duly offered in evidence and accepted, and stated by Mr. J. H. Gensler of Portland, Oregon, a commercial photographer, to be a picture made from a negative taken by him on Sept. 2, 1918. Introduction of the negative was expressly waived by counsel.) [85—65]

**Testimony of A. Grieve, for Defendant.**

A. GRIEVE, called by the defendant, testified as follows:

I live in Tacoma. I am a masonry contractor. I have done nothing but lay tiles for about eight years. I have used Denison tile for eight years. There is nothing new in the idea of vertical aligning of webs of hollow tile. (Objection, Mr. RAFFERTY: Witness not an expert.)

The COURT.—He has been laying tile for eight years.

Mr. RAFFERTY.—That does not qualify him as an expert.

The COURT.—So he ought to know whether anything new in it or not.

The WITNESS.—I have laid tile for eight years but it is a principle in all building material to have the arrangement straight or else the wall would be a weak wall. The laying of bricks suggests the same theory to my mind. [86—66]

**Testimony of A. Klose, for Defendant (Recalled).**

A. KLOSE, recalled by the defense.

Direct Examination.

(Questions by Mr. GEISLER.)

I am the president and part owner of the Columbia Brick Works. I have had in the last—ever since 1911 or '12, I have been more or less interested in tile construction and expected to work out some new ideas in regard to it, etc., making dies. If the tile wall is supposed to carry the weight of the building, it is only used for the construction of one or two-story buildings.

A. "There, of course, is an advantage in having the webs directly over each other. As we are putting up this bunch of kiln run tile, there is always variation in the size, and it would be practically impossible to construct a wall out of ordinary tile, kiln run tile, where the webs would come vertically above each other, direct vertical alignment, as Mr. Heath calls it in his patent.

Q. Do you see anything in the Heath construction which would differ his kind of wall from any other wall in that particular?

A. I could see nothing unless he would make a tile which was absolutely select as to size; it couldn't vary a sixteenth of an eighth of an inch in size; otherwise, his construction would be no good; the webs would not come in vertical alignment.

Q. What would be the fact if he attempted such select tile construction, in regard to cost?

A. Well, it would always be prohibitive, would

(Testimony of A. Klose.)

be cheaper to take a brick wall or some more expensive construction.

Q. Now, state whether or not the fact that the webs are more or less out of plumb vertical alignment is made allowance for in the construction of a wall? A. Yes, it is."

Q. "I would like to know, is there any deduction made from the supposed supporting strength so as to allow for inequalities in vertical alignment?

A. No, there is not. It is not considered sufficient to [87—67] make any allowance in that, and depends a good deal on the block; for instance, if the webs are close together, it does not hurt as much if they lap over a little bit, but if the webs have big openings, like the Johnson block there, then it would be a disadvantage to have the webs lap over; wouldn't be as strong. The closer the webs are together, the less it will hurt to have these vertical webs lap over.

Q. I would like to get from you a statement with respect to the necessity of having direct vertical alignment—direct vertical alignment of the webs in your tile construction. I will have to stack them by rule. I will align them so as to make a twelve-inch wall. You may state whether or not when they are arranged in twelve-inch wall, the webs are or are not in vertical alignment?

A. They are not in vertical alignment, at least the center webs.

Q. But with respect to the outside webs?

A. They are in alignment.



(Testimony of A. Klose.)

Q. Now, a wall constructed in that form would be sufficient in strength, supporting strength, for what height?

A. Up to three stories, and for about ten times the necessary strength which is required to carry the weight of it." We manufactured two unit blocks in 1912; in the latter part of 1912 or early part of 1913 I began the manufacture of the Denison tile, the Denison Interlocking Block, which patent appealed to me, and I thought it was a good sort of block to manufacture, but they insisted on our making such a large unit like this one up there, it was rather impracticable to make it satisfactory to us. So we only made up about four or five lots, and quit the manufacture of that block, and as we could see the advantage of having four vertical webs in an eight-inch block and six in a twelve-inch wall, it was a very simple matter for me to make a block with four vertical webs, and a small block with two vertical webs in order to [88—68] make six vertical webs in a twelve-inch wall, and I started to manufacture these blocks. I started to manufacture these in 1914 in August, but I started to work on the idea getting out the drawings early in spring, about April or May. I heard of the Johnson block. I was acquainted with that since 1909; I had never seen it used, but I had seen it in catalogues, and I know the construction of it. I want to make this statement I should have made a while ago. When I conceived the idea of this construction, I had in mind this Johnson block, which Mr.



(Testimony of A. Klose.)

Heath has used in his construction, and then I figured out by making a little different style of block, I would have a chance to make an eleven-inch wall, or a twelve-inch wall, or thirteen, or even fourteen-inch wall, which is very essential sometimes. People just have so much opening—an eleven-inch wall is required, and these blocks are shoved quite close together some times; in general use there is only twelve-inch wall used. This blueprint of ours shows a thirteen-inch construction. This is the thirteen-inch wall. We lay this block thirteen inches. These vertical webs come almost in direct alignment, except the variation in blocks that would prevent it coming in exact vertical alignment, but by moving this block over one inch, we make this space a little larger, have a twelve-inch wall, and these webs of course would be staggered as shown in the sketch we had here yesterday, and as these blocks lay now; and even some walls made with these blocks tight against other blocks, eleven-inch wall. And of course, these webs go still further over, stagger still more, even by making a twelve and a half-inch wall; these webs would lap over one-half inch over there and stagger considerably too. But most of the construction is a twelve-inch wall; only in one instance where eleven-inch wall made of these blocks, and I don't know of any instance where a thirteen-inch wall was laid up. [89—69]

Q. "What is the fact as to whether your blocks would be capable of use only in a wall construction where the webs would be in direct vertical align-

(Testimony of A. Klose.)

ment? To make my question plain: There is a charge in the complaint that your blocks are susceptible to use only for the building of a wall with webs in direct vertical alignment?

A. Why, that is all nonsense. Can build all sizes of wall up of these blocks, from eleven to fourteen inches." [90—70]

**Testimony of Frederick Heath, for Plaintiff (Recalled in Rebuttal).**

FREDERICK HEATH, called in rebuttal by the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. RAFFERTY.)

My name is Frederick Heath of Tacoma, the inventor of the Heath patent, referred to in this case. I first conceived the idea of the unit that is covered by the Heath patent during September or October, 1911. At that time my occupation was that of an architect. I had used tile construction of various kinds, of course, brick work and general masonry as it is used in buildings. I was familiar with the Denison tile, and also with the Jumbo, and had used them in building. I had used before that a tile that was set on end, made from a heavy eight by eight, so that I was familiar with the uses of tile, and some of the difficulties we had in putting them in a wall, and it was through that that I worked out this idea. Now, the idea came to me very quickly. It was not a process of working it out, simply comes to one as a flash. In a brick wall, in relation to the

(Testimony of Frederick Heath.)

bearing strength of the mortar that it is laid in, there is about forty per cent excess strength of material in the brick. I used that idea after conceiving of the form for developing the size of what I call the common unit of the single void, and the same thing applies to the double void block, of making it forty per cent less material, and by that means it will develop all the strength that there is in the mortar joint in which they are laid. The mortar joint is the bed or joint laid horizontally between the courses of either brick or tile, and as the mortar is made of lime and sand, it is not as strong as the clay product that is burned, and the surface of the mortar, of course, is larger than the surface through the section of the tile, so that there is enough strength in the vertical webs of the tile to develop all the [91—71] strength that there is in the mortar between the flat or level surfaces.

“Q. Do you know whether the Johnson patent covers a single block?

A. It does not.

COURT.—I don't get that clear. I want to see if I understand that clearly. According to your idea the Johnson construction is made by placing the construction vertically.

A. On end.

COURT.—The webs coming directly over each other?

A. These two are the Johnson construction.

Mr. RAFFERTY.—Just a minute. Are these marked in any way?

(Testimony of Frederick Heath.)

COURT.—It doesn't make any difference whether they are or not.

A. If you will observe by looking on top of these, there are two central webs on each one. The meeting shells of the two tile are placed in relative positions the same as those two are there. Then the next block is placed over that way, so that these shells and webs rest directly over the webs and shells in right-angled direction of the tile below, and the weight is carried by the contact of mortar that is between the edges of these tiles. Now, that is the way, as I have shown it here of the drawing in the Johnson patent. That is the exact drawing."

"Q. What advantage do you claim for the Heath unit type of construction over the Denison interlocking type of construction?

A. The main advantage is in the use, with the Heath, of a double and single unit laid in such a manner that it is applicable to any construction on four inch units. That is, you can take the Heaths joint or tile laid in the same way that the blocks are laid upon that table, and allow a flue in an eight-inch wall to pass through the center of the wall, laying up the sides with [92—72] the two half or single units, and allow the running bond on each side to pass along, bonding without any break. A construction of that kind is impossible with the Denison without breaking and cutting the tile. The main distinction between the wall construction of the Denison tile and the Heath tile is that the Denison tile is made with one shape reversing over, re-



(Testimony of Frederick Heath.)

versing and interlocking, and the Heath is made with two tiles, a single and a double unit, and there is no similarity between the two forms. After they are built in a wall, in a twelve-inch wall, as shown in the exhibit, the mortar bed in the Heath tile are continuous through the wall, on level line; in the Denison wall they are in three different steps. That is the main distinctive difference between the two wall constructions and the tile that they are formed of."

I have made observations as to the result where my method of construction has come into competition with the Denison interlocking tile. This was tested out by the Government in San Diego in building the Aviation Building, in which my tile are at present being used. And in order to satisfy the Denison manufacturers and the National Fireproofing Company, at the same place, and one or two others, they built some other buildings with their tile, and in cost of the laying and the cost of the mortar, it proved that my tile was cheaper than any of them to lay. The work was all done by the same contractors and the same men. A wall in which the webs all align would be a great deal stronger than where some webs come over voids so much that it would be difficult to state. Where webs don't register one over the other, and the pressure of the wall is applied, it produces a shear of the clay of the horizontal beds. That is, the pressure or load is carried down one web, then is carried in transverse direction down the next, and the shear of tile in that



(Testimony of Frederick Heath.)

way is only about [93—73] one-fourth to one-third the actual crushing strength. That is the result of tests made by Mr. Johnson in Chicago, under the inspection of Hunt & Company, Engineers.

Cross-examination.

The Johnson block would differ in size and relation to the smaller unit. The unit is common to both the small and the double and proportioned so as to equal two, and work out some of the conditions that masons are familiar with in building a wall. That is just the application of good common sense. The Johnson block is specified in the patent as being set vertically. I was present at the time of the taking of his (Mr. Johnson's) deposition in Chicago. He said that his blocks could be laid sideways. I remember about his stating that they had been. Mr. Johnson's attention was called to the fourth figure in the second row of that page (National Fireproofing Company's catalogue).

“Q. Now, if you had that before you, had seen that, granting that that shows a cross-section, horizontal section of a column, construction—having seen that, would you have to have someone tell you how to build the same kind of construction into a wall?

A. Yes, I think I would, because this construction as is shown here, even if laid on its side, would not be my construction in any way.

Q. In what respect do they differ?

A. This construction is made by laying the Johnson tile—first, it is all set up on end, but assuming

(Testimony of Frederick Heath.)

it had to be laid on its side, so as to answer your question properly, the Johnson block would be laid flatwise, and the next course of it would be laid on edge, and then to the other side of it, on top of the [94—74] flatwise block, would be one set on edge; intervening between there would be a square tile, and then another tile laid upon the side.”

“COURT.—Assuming you had a Johnson block and a half block that seems to be common, would those suggest to you the possibility of building a wall out of the Johnson block and the half block by laying the Johnson block on the side?

A. No, it would not. Nothing there to convey the idea, unless one was really searching for it in some way.

Q. What do you mean by that if one had been searching for it in some way? Do you mean that you did not have any knowledge of the Johnson block being laid on the side?

A. Why, yes, that would be one idea.”

“Q. Now, as you have remarked, the making of a half block is a very common expedient. We find that in the type of block which had been used as testified for twenty years or more, consisting of a two void block and a single void block?

A. Yes, sir.

Q. And it was then simply taking a single void block, such as had been previously known, and combining it in the building of a wall with the Johnson block?

A. That was my patent. That is my invention,

(Testimony of Frederick Heath.)

because up to that time it had never been done. It could have been done if somebody had thought of it, but they didn't think of it."

"Q. Now, in the Denison tile, which you admit, I believe, as having known prior to your alleged conception of an improvement—in the Denison tile, I say, you find vertical alignment? A. Yes.

Q. Were you present at the taking of Mr. Denison's testimony in Cleveland, Ohio? A. I was.

Q. Do you remember his making a statement of the building of a wall there in his office? [95—75]

A. I do. I remember that.

Q. And that in that wall the spaces between adjacent—between the sides of adjacent blocks is left vacant? A. That is the way I remember it.

Q. Did you take any steps to disprove the statement? A. I did not.

Q. You believe what he said then was a fact?

A. Yes."

That interlocking feature would be brought about by the use of a two cell block with a half block alongside of it, such as we have out here in evidence before, the same effect. There is nothing new in the interlocking idea.

"Q. I believe you said that there would be the variation in dimensions of your blocks coming from a kiln because of the difference in burning?

A. Be slight variation.

Q. Define what you mean by slight?

A. Well, I put a quarter of an inch as extreme.

Q. Those variations, however, would have the

(Testimony of Frederick Heath.)

effect of causing a slight movement or just proportionately a movement out of the vertical with regard to the alignment of the web?

A. It would.

Q. Now, you used the term "exact alignment" before the Patent Office and also in your brief in the Court of Appeals. Do you remember it?

A. Yes.

Q. Would there be any more exact alignment in the use of your tile with respect to the webs than there would be in the Denison tile?

A. No, practically the same way if the Denison tile were made with the same narrow slot in the center, of the same dimension, I mean.

Q. In other words, the width of the narrow slot in [96—76] the center is a matter of choice?

A. No, it is not. It is a matter of design.

Q. It is a matter of mathematics again?

A. Yes, sir.

Q. The width in the Johnson block between the two central webs, the width of the space, I mean, between the two central webs was designed so as to place the two webs in registration with the webs under them?

A. That is the object of the design.

Q. And you followed the same suggestion?

A. No, I didn't follow the same suggestion. I worked independent of him without any knowledge.

Q. Didn't you know the Johnson block at all?

A. No, sir.

Q. But you said in your direct examination, if



(Testimony of Frederick Heath.)

I am not mistaken, that you knew the Johnson block and the Denison block before you got up yours? A. No, sir.

Q. Then I am mistaken. You simply didn't have any knowledge of the Johnson block?

A. In the prior answer I told you that the first knowledge I had of the Johnson block was as a reference in the Patent Office on the first examination.

Q. But the idea of the Johnson block, to come back to that, is just exactly the same?

A. Why, you can read it into it, but that is all.

Q. I don't understand you. Make yourself clear, when you say "read into it."

A. You are reading a construction into the Johnson block that does not belong to their patent.

Q. Have you seen the Johnson patent?

A. Why, yes. [97—77]

Q. Do you remember your brief before the Court of Appeals? A. Not in that respect; no.

Q. I call your attention to it. I call your attention to the bottom of page 7 of your brief before the Court of Appeals and I shall read from a copy that I have, and you kindly check me. "Finally, the statement in Claim 1 that the webs in one course are in vertical alignment with the webs in the next course, is strictly true in appellant's *advice*, and is not strictly true in the device of Johnson." What were you compelling in that case?

A. That has reference to my claim No. 1. That is the relation of the double blocks to each other



(Testimony of Frederick Heath.)

in which they are laid flat wise, two double blocks side by side, and a double block placed immediately over them, so that the double web of the double block lines over the side webs of the two double blocks in the course below."

"Q. Before we look at that claim No. 1 of your patent I will call your attention to page 1 of your specification, line 78 to 81 inclusive, I will read the particular sentence: "The several blocks are bedded in mortar, but the vertical spaces between them are left free or open, thus forming a series of narrow dry air chambers." Now, you had in mind there that a space could be left open or closed up? Correct?

A. I had in mind the space to be left open.

Q. Yes, you specify there. But if you hadn't specified it—in other words, your idea in calling particular attention to it was that there might be a space, but that wasn't what you were after; the space should be left open.

A. I made that space in there to correspond with the open space between the upper tile for the purpose of air void.

Q. But you of course are familiar with the geometric [98—78] conception. When we speak of geometric conception we don't care whether the space is filled or vacant. The space is there just the same. A. In a sense.

Q. Now, in order to introduce the idea that the space was to be left there open, emphatically, you specified the space would be left open? Correct?

(Testimony of Frederick Heath.)

A. Yes."

"A. The unit is made so that it lays up quite close together. My single unit and double unit are so proportioned by a common dimension that the space between the two tile is narrowed down to about three-eighths of an inch, conforming to the small space that I leave in the center of the double unit. Now, you can lay with these under the same conditions with which you lay brick work. A mason in laying brick work can draw a line on one side, what I mean by that is a string and lay to that, and gauge the thickness of the wall by the thickness of the brick. Now, with the tile as these made by the Columbia people in which they have left a wide space between there it can be crowded over and telescoped by careless work, or by intent, thereby weakening the wall. In my wall that would not occur any more than it would in a brick wall. That is one thing I had in view in the development of the tile, and the design of it, and in proportioning the size of the units so that it would prevent the careless workmen from throwing the members out of alignment.

Q. The results that you obtain in that manner are practically the same results that are obtained by the Denison wall construction?

A. No, not as you have shown it there.

Q. That is not a model, but having reference to the way the Denison tile is actually laid?

A. In a general way, yes, the Denison are safeguarded in alignment of the web in very much the same manner that mine are." [99—79]

**Deposition of Ernest V. Johnson, for Defendant.**

ERNEST V. JOHNSON, called as a witness in behalf of the defendant, being first duly sworn, in answer to questions propounded to him by Mr. HANSON, testified as follows:

**Direct Examination.**

(By Mr. HANSON.)

My name is Ernest V. Johnson; age, fifty-nine years; Chicago, Illinois, is where I have resided since 1877. My present place of business is 749 Railway Exchange Building, Chicago, and my residence, 3936 Grand Boulevard. I am contractor for the construction of fireproof buildings. I am familiar with the manufacture and uses of hollow tiling. I have been continuously engaged in the manufacture, sale, and construction of hollow tile for fireproof purposes in the erection of fireproof buildings in Chicago and pretty generally all over the entire United States since 1879. During that time I have followed very closely all of the processes used in the manufacture of hollow blocks both fireproofing and building purposes. I established and erected in 1880 a factory at Ottawa, Illinois, which plant was under my management until 1893. Since that date I have operated clay plants at a number of points throughout the United States. Since May 15, 1915, I have conducted the business of fireproof construction on my own account and in my own name in the city of Chicago. I have had practical experience in every branch and phase of the designing, manufacturing, and erecting

(Deposition of Ernest V. Johnson.)

for all known character of hollow tile for fireproof building purposes. I personally for many years superintended the details both for my factories and also the installation of the tile in place into the buildings. I further made the designs for all dies from my own drawings, and wrote the specifications describing the proper method covering the manufacture of the blocks, and, in addition thereto, the practical and simplest method of [100—80] assembling the blocks for the many purposes into the structure of the building. There is nothing in connection with the practical side of the hollow tile business that I have not devoted my best time and effort to. I am familiar with almost every known method of hollow tile construction, both for floors, walls, partitions, columns, girders, roofs, etc., and during my term of service as western manager of the National Fireproofing Company I had full access to all sheets and all data controlled by this company and was familiar with the different classes of blocks manufactured by this company in all its plants in different parts of the United States, which plants I had visited at different times, there being some twenty-six different plants in all. During the course of my work in the hollow tile art I have made quite a number of inventions relating to hollow tiling. I am the patentee of United States letters patent No. 837,572, issued December 4, 1906, to Ernest V. Johnson, of Chicago, Illinois, for an improvement in building blocks.

“About the year 1892 I leased the factory of the



(Deposition of Ernest V. Johnson.)

Corning Clay Works, located at St. Paul, Minnesota. This plant was manufacturing what is known to the trade as a terra cotta lumber block, so-called on account of a certain admixture of sawdust mixed with the clay during a plastic state and consumed by the heat of the clay during the process of burning, thus making a lighter and more porous material. This plant I continued to operate for a period of five years, and the works were then dismantled as the market was not sufficiently large to take care of the product.

The principal blocks manufactured at these works consisted of 3x12 by 16, 4 by 12 by 16 and 6 by 12 by 16 hollow blocks. We manufactured many thousand tons of these blocks, most of the material being used for the purpose of building hollow tile partitions in fireproof skyscraper buildings. But in addition thereto we sold a large amount of these blocks to [101—81] general contractors and mason builders in St. Paul, who bought these particular blocks because they claimed they could lay them up in place of brick work, and where a large quantity of brick was not required they found these tiles advantageous for the purpose. I know of my own knowledge that 8-inch, 12-inch and 16-inch walls were laid up with these blocks in innumerable cases, and they were laid flat on their sides of the necessary thickness to produce the desired thickness of wall. I made a few inquiries at that time around among the architects and builders in St. Paul to see if they would encourage the use of



(Deposition of Ernest V. Johnson.)

these blocks as a substitute for brick, and thus enable me to continue to manufacture goods at the Corning Clay Company's works. I met with no encouragement, however, because the argument was made against a block laid on its side that it was not sufficiently strong to displace common brick except in buildings of low height, and that they could not get the city departments to use these blocks for load carrying purposes in competition with common brick, and for that reason we abandoned any idea of trying to keep our plant running on this particular block, and the same was dismantled. There is nothing new or novel in the use of a hollow block laid horizontally for the purpose of constructing a wall.

Q. Is the last sentence of the previous answer true as to the time prior to the date of your patent No. 837,572?

A. Yes, sir. It was common practice with us in those days to use hollow tiles for almost any purpose on a building.

Q. And laying them both horizontally and vertically?

A. Yes, vertically and horizontally. Most generally horizontal, because the average bricklayer can spread the mortar on a block laid horizontally with little or no effort, and consequently they always lay them flat. It is pretty hard to get them to do anything else. Therefore, they never develop the full strength of the block.

Q. Please state briefly the advantages derived

(Deposition of Ernest V. Johnson.)

from the construction [102—82] and the method of laying the blocks of your patent No. 837,572.

A. The primary object of assembling the blocks as shown by this patent is for the purpose of developing the full structural value of the cross-section of the block. At the time this patent application was made the question whether we should lay the block on the side or vertically was discussed and amplified, and was an open book to me, as it would be to any practical man accustomed to the use of laying tile. In forming my claims they were so drawn that the block could be laid either way, but since the introduction of this block I have uniformly recommended the end section or vertical section system of construction whereby each and every inch of cross-sectional block is subject to stress, thus developing the full crushing value of each and every inch of material used in the formation of the blocks, which would not be the case if the block were laid upon its side, there being a loss in the use of the block in this manner of approximately 45 per cent of efficiency or weight-bearing strength, for the reason that if the block is laid on its side with the hollows horizontal there would be four vertical webs to support the load on the wall. The horizontal top and bottom outer shells which constitute about 45 per cent of all the webs would not be in compression and the block would therefore be deficient in strength to that extent, when compared with the block laid with all of the webs and the outer shells in vertical position." The block is so designed that

(Deposition of Ernest V. Johnson.)

when laid in combination with other blocks the hollow spaces in the blocks immediately above and immediately below each course of tile will register accurately one above the other. This will bring the entire outer shell and the cross webs of each block directly in compression, and the block was designed and built with that object in view, having in mind a unit of size sufficient to take care of a mortar joint between two adjoining tiles. [103—83]

I learned about the advantages from the experience I had in my testing station in 1903 and 1904. This principle of end construction could be carried further and almost generally throughout my experience in fireproof construction of buildings, for the reason that during the last twenty-five years a complete revolution has taken place in the methods of assembling hollow tile blocks in flat arch construction.

Q. "In other words, an ordinance relating to the use of tile like that of patent 837,572 was passed by the city council of Chicago and is still in force?

A. It is. Among other provisions governing the use of hollow tile special provisions as to workmanship were called for and strictly enforced."

"All tile must be thoroughly wet before using and when used in columns must be set on end with the voids running vertically and directly over each other, and with the webs in direct line of pressure.

"All vertical joints must stagger and hollow

(Deposition of Ernest V. Johnson.)

tile must be of proper dimensions to meet this condition, as no broken tile will be allowed."

With regard to hollow tile walls, the section sets forth in detail the value, the permissible stresses per inch on the net sectional area on which hollow tile shall be stressed and which vary from the requirements for hollow tile columns; but in other respects—

"The quality of the tile and mortar and special provisions as to workmanship as specified for hollow tile columns shall apply to hollow tile walls."

I am fully familiar with that catalog of National Fireproofing Company. Well, there have been a number of editions of this book. I do not know just what edition this is. This is 1910—April, 1910. This is the second edition. I do not know when the first edition was published. Page 46 of this catalog shows the details of the Monarch block. The Monarch block is a hollow tile covered by my patent No. 837,572. The sheet shows how the blocks can be assembled together, beginning with the unit of two blocks, which make a column 8 1/2 inches square; the next size being a combination of three units, column 13 by 8 1/2 inches; thence to [104—84] a column 13 inches square formed of our blocks, with a center or closure block one-half the size of the surrounding blocks; advancing in different sizes until a column 31 inches square is shown, or, in other words, covering the use of this block specifically for column construction and showing the num-



(Deposition of Ernest V. Johnson.)

ber of units or blocks required to construct the different sizes of columns from large to small. In 1910, the date of this particular catalog, somewhere between 5,000 and 10,000 were sent out. The National Fire Proofing Company issues catalogs never less than once a year, and sometimes two per annum; and we had a mailing list in our central office of all the leading architects, contractors, engineers and builders throughout the country, and they were sent one of these publications as fast as they came out.

“Q. Now, referring to page 46 of this catalog, how were the blocks laid?

A. They were laid with the hollows vertical.

Q. That is, they were in an end to end relation, with the hollows or voids running vertically?

A. Running vertically.

It is eminently practicable to lay them with the hollows or voids horizontal. Take up, for instance, a 12-inch wall. In making up a 12-inch wall I would lay it exactly in the same way as shown by this sketch, 13 by 8½ inch Monarch block column; that is, run along and stagger it over on the other side; if we are going to move that block, lay it on its side. A 12-inch wall constructed of blocks such as are shown on page 46 of this catalog would be identically the same whether they were laid on end or whether they were laid on the side. You could build those walls—the only thing is, you would look at the picture like that. Instead of looking at it like that you *would* at it that way. That is the only dif-



(Deposition of Ernest V. Johnson.)

ference. They would lay in section just the same.

(Witness illustrates his last answer by laying the catalog flat on the table and then raising it to [105—85] have it at right angles to the plane of the table in the examination room.)

There is your wall. There is your column. A block is designed to be laid either way. I have given my reasons why it is preferable to lay it with the hollows vertical, in my opinion.

Q. "Now, suppose an ordinary bricklayer were asked to construct a 12-inch wall employing the blocks of the patent 837,572, say 16 feet in length and 10 in height; just what would he do?

A. If he was an ordinary bricklayer and had never seen a hollow tile before and was told to build a 12-inch wall out of blocks 4 by 8 by 8 which I hold in my hand, he would lay the first course on its side, the next tile he would lay adjoining it. He would take his hammer and he would bust this tile in two. See? He would cut this here and cut it here, the same as he would cut a brick off, and he would make what we call a half, the same as he cuts a brick in two.

Q. In testifying so far you have had before you some wood models. What are these models?

A. They are a wooden reproduction of a Monarch block, size 4 by 8 by 8.

Q. You have indicated in your answer cutting one of these blocks in half. Just where would they cut by the bricklayer?

A. Right down here. He would take his trowel

(Deposition of Ernest V. Johnson.)

this way and then he would turn it over. Then he would hit here and hit it there.

(Witness indicated hitting the block at different points on the shell in line with the central void of the three voids of the block.)

I would demonstrate that very quickly if I had a block here and a mason's trowel.

Q. We cannot very well do that, however, because this testimony is being taken in the form of a deposition. Therefore I would like to have you picture to us in words as well as you [106—86] can do so that the Court will get the understanding of just how the ordinary mechanic would build this wall employing this block.

A. That would be the natural and easiest and obvious way to make a 12-inch wall out of that block. That is the obvious thing to do. That is what the illiterate man, the uneducated man, the man that never saw a hollow tile before, would do. He would not have to have an engineer instruct him how to do it or an architect write him a specification for him to do it. The natural, obvious method of producing a bond in a block of that size would at once appeal to him because if he is a mason he knows the nature of a bond and he knows that masonry must bond on alternate courses. Consequently, the only way to take that block and use it would be to split this block in here and make a half, come along on the next course and break joint that way, and put a half on this side. That is the obvious method." Now, the third course he would split an-

(Deposition of Ernest V. Johnson.)

other tile, cut another tile in two, set the other half here and then go ahead and repeat the performance on the next course. Now, that is what the average bricklayer would do. But he could build the wall in an entirely different manner. Now, a bricklayer, who is taught his trade, has first got to learn the art of a bond. That is just as essential to a brick mason to know how to bond his work together as it is for a statesman to know how to read and write. It is a rudimentary education that he receives. All masonry is assembled from units. The material is brought to the building in the form of units, large or small, and they are put together and tied together with cement. Now, he has got to bond those units together; otherwise the wall is imperfect and will fall if there is a heavy weight put on it. Consequently, the question of bonding masonry is, well, it is an open book for the mechanic that has learned his trade, and the obvious thing for the *mechanic that has learned his trade, and the* [107—87] *obvious thing* for that man to do with that block tile, there is *only thing* he can do and lay them all flat. He can't lay that tile in any other way and make a masonry bond and break all the joints.

Now, I was going to tell you that there are other ways of laying this block. I have told you the obvious way. There are *may* different ways of laying it. Take the case of a 12-inch wall, that block is split in two through the center web, as I have repeatedly done in column and wall construction.

(Deposition of Ernest V. Johnson.)

The half would be built right alongside of the whole block, and on the next course by breaking joints the bond would be safe across the wall and the webs in the upper and lower courses would register one over the other. A bricklayer who is on to his job would turn this rough edge in to keep this outer side face fair. The central or small void in that case would register directly over and under the vertical joint of the intermediate course. It would register over and it would register under between the joints—there is only one joint there, between the one joint in the intermediate course. It would alternate in the different courses wherever a bond was required and you could not build a wall without a bond successfully. A trowel of mortar was dumped right on top of the tile. The mason then took the point of the trowel in his hand, spread it round here until he pressed it out pretty well toward the edge on both sides. Then he cut it clear with the trowel, so fashion. Clear around the edge so that it was not sticking over. Run your trowel along that way.

“Q. Was that the practice, to your personal knowledge, with reference to tile which was laid flat in 1910?

A. Yes, sir.” And long previous to that in 1910 and previously, it was common practice in building walls where you laid the tile flat on its side, to employ the 6-inch tile and half tiles.

I have seen Patent Office printed copy of patent to [108—88] Frederick Heath, No. 1,215,149, and



(Deposition of Ernest V. Johnson.)

have considered the construction therein shown. I am familiar with the construction therein shown.

“Q. Please state whether or not you see anything new in the construction shown in the Heath patent 1,215,149 compared with what was known in the hollow tile art, say in the spring of 1911?

A. I don't see anything in that particular assemblage of blocks that was not a known factor to me both in practice and in theory.

Q. My question referred to a period in the spring of 1911 or prior thereto. Would your answer be the same? A. Yes.”

Cross-examination.

(By Mr. MACKLIN.)

“XQ. In your last answer you have stated that all architects specify joints of mortar full flush. Are you sure that this is the practice throughout the country?

A. It is the general custom in laying out not only hollow tile but masonry and brick work to specify that the joints shall always be flushed full with mortar.” Whatever Denison tile I have laid or seen laid we always filled the joints full. We certainly did not attempt not to fill them. They were supposed to be filled. I have laid and seen laid the Denison interlocking T-shaped blocks. Well, a mason who was accustomed to handling hollow tile would split one of those pieces (Johnson Blocks) apart in less than half a minute, if it became necessary to do so. If I had the contract for the erec-



(Deposition of Ernest V. Johnson.)

tion of a wall and it was specified end construction, I would lay it end construction.

XQ. That is not what I asked you. I asked you would you not strongly recommend arranging them vertically?

A. I certainly should; if it was a load-carrying wall I would. If it was merely a light partition, carried no weight, [109—89] I would lay them on the side the same as we always used to lay our partitions on the side, because it is fully as good for that purpose.

XQ. "Do you mean when you say you manufacture such partition blocks that the blocks if they are to be laid horizontally, usually have one dimension corresponding to the thickness of the wall?"

A. Yes.

XQ. I refer to catalogue "Defendant's Exhibit, National Fireproofing Company Catalogue," and ask you if there is anything in the nature of printed instructions associated with the diagrammatic figures of page 46 to indicate that these are wall sections or are to be laid horizontally?

A. The illustrations show the tiles as laid for construction of columns. There is no reason, however, why they could not be laid on the flat.

XQ. That is not what I asked you. Have you ever published any catalogue referring to such diagrams and showing a construction exactly like or very nearly like the construction illustrated in the Heath patent 1,215,149?

A. I do not recall any such publication."

(Deposition closed.) [110—90]

**Deposition of L. A. Heil, for Defendant.**

L. A. HEIL, a witness called on behalf of the defendant being duly sworn, deposes and says, in answer to interrogatories propounded to him by Mr. H. B. FAY, as follows:

(By Mr. FAY.)

I am Louis A. Heil; I am forty-nine; residence, 10901 Grantwood Ave., Cleveland, Ohio; occupation salesman for the Evangelical Publishing Company. I was there in 1911 as assistant printing manager; salesman at the same time. The Denison Tile Catalog, bearing the name of the Ohio Clay Co., 1337 Scholfield Building, on the cover. "Defendant's Exhibit, The Ohio Clay Co., Catalog of 1911," was published between May 24th and June 25, 1911. According to our order there were five thousand copies. A small amount was delivered about June 20th, and the order fully within the next two weeks following.

Direct examination closed, L. A. Heil.

**Cross-examination.**

(By Mr. MACKLIN.)

XQ. 23. "Do you find anything on this catalog itself to indicate when it was printed?"

A. There is no date on the catalog. Our original order at the office would show the stamp of the day it was billed."

(Deposition closed.) [111—91]

**Deposition of George W. Denison, for Defendant.**

GEORGE W. DENISON, a witness called on behalf of the defendant, being duly sworn:

(By Mr. FAY.)

I am George W. Denison; I am thirty-one; residence 2225 Cunnington Rd., Cleveland, Ohio; tile manufacturer. I am vice-president, secretary and treasurer of the Ohio Clay Co. My connection with that company in 1911 was vice-president and superintendent. The business of the Ohio Clay Company is manufacturing and selling building tile. Defendant's Exhibit "The Ohio Clay Co., Catalog of 1911," is a catalog descriptive of Denison Interlocking Tile, printed by Evangelical Publishing House, for the Ohio Clay Co., and invoiced to the Ohio Clay Co., August 4, 1911. We received this catalog on or before that date.

Q. "Will you please sketch the manner in which Denison Interlocking Tile is laid up in a wall, indicating the mortar in blue pencil, and showing only several lays of tile?"

A. I guess that question is answered. [112—92]

By Mr. MACKLIN.—The sketch just offered in evidence is objected to for the reason that it is irrelevant, immaterial, and not the best evidence; if such a wall exists the structure itself should be proven.

The WITNESS.—I will make a pencil sketch showing a wall in section, built of 5x8x12, and 5x4x12 tile, showing this wall as it is customarily laid up, and indicating the mortar portion in blue pencil. "Defendant's Exhibit, Sketch of Wall

(Deposition of George W. Denison.)

Made of 5x8x12 and 5x4x12 tile.” We manufactured such 5x8x12 tile and 5x4x12 tile about two or three years before application for Denison Interlocking Tile Patent was made; this would be 1905 or 1906. Practically every fireproof or semi-fireproof building built in the last eight or ten years have used 5x8 or 5x4 tile.

Direct examination closed.

Cross-examination by Mr. MACKLIN.

If the vertical web in the 5x8 is of the same thickness as the carrying section of the 5x4 above it, the outside face of this section of the 5x4 will align with the center of the carrying web of the 5x8. They may not, be said to be in true vertical alignment.

Cross-examination closed.

(Deposition closed.) [113—93]

**Deposition of W. C. Denison, for Defendant.**

W. C. DENISON, a witness called on behalf of defendant, answers Mr. H. B. FAY as follows:

My age is fifty-nine; residence, 2881 Euclid Heights Boulevard, Cleveland, Ohio; manufacturer of hollow building tile. I have been the president of the Ohio Clay Co. some twelve or fourteen years. In 1910 and 1911 we made the Denison interlocking tile, some hollow brick, and a few other shapes of hollow building tile. I am the W. C. Denison who invented the building block shown in U. S. reissue patent No. 13,299. We began to manufacture build-



(Deposition of Frank Kazda.)

ing block or tile such as is shown in this patent about 1908 or 1909.

(Deposition closed.)

**Deposition of Frank Kazda, for Defendant.**

FRANK KAZDA, a witness called by the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. GEISLER.)

My name is Frank Kazda; age, fifty-two; residence, 2307 South Grant, Tacoma Washington. I have been a brickmason since I was 16 years old, when I started. I remember about a building being put up at Shelton, Washington. I was foreman out there on the job. We used what they called Denison Tile construction. The first story was 17-inch wall, what we call a 17-inch wall, and the second was a 12-inch wall. [114—94]

Now, with regard to the spaces in between the sides of the adjacent tiles in the general laying there is no—that is, we don't put any mortar between the spaces, except what kind of squeezes in there by spreading the beds on, which would drop in when we would spread the bed joint on, but that did not fill them up,—that is, unless the specifications would require.

(Deposition closed.)



**Deposition of J. Kazda, for Defendant.**

J. KAZDA, a witness called by the defendant, being duly sworn, testified as follows:

**Direct Examination.**

(By Mr. GEISLER.)

My name is J. Kazda; age, twenty-three; residence, 2336 South Hosmer Street, Tacoma; occupation, for the last eight years I *remember* doing work at Shelton, Washington, on Mercantile Building. There was a wall embodied in that building made of tile, interlocking Denison tile. This work was done, to my knowledge, six years ago the middle of May, that is, in 1912.

(Deposition closed.)

Attached to the foregoing depositions is a pamphlet, "The Denison Tile. The Ohio Clay Co. 1337 Schofield Bldg., Cleveland," in which is writing with ink and pencil, and containing exhibits which it is impracticable to copy. [115—95]

Filed in the U. S. District Court, Eastern District of Washington. Dec. 21, 1920. W. H. Hare, Clerk.

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Pl E 4

Ad

In the Court of Appeals of the District of Columbia.

Patent Appeal No. 1044.

In the Matter of the Application of FREDERICK  
HEATH.

**Opinion—Van Orsdel, J., Court of Appeals, District of Columbia.**

This appeal is from the decision of the Commissioner of Patents refusing to grant appellant a patent for a hollow-block building wall, expressed in the following claims:

“1. A building wall composed of hollow blocks laid horizontally in courses one above another, each course including blocks having three longitudinal voids and laid with relation to similar blocks in the next course as described, so that the central void in one block is always opposite the space or joint between the blocks in adjacent courses and the webs in one course are in vertical alinement with webs in the next course, as described.

“2. A building wall composed of horizontal courses each formed of blocks having a single void, and other blocks being laid adjacently and alternately with each other, the central void of the three-void blocks being in direct vertical alinement with the space between blocks in adjacent courses, as described.”

The rejection is based upon the following references: Patent to Yarnall, No. 695,594, issued March 18, 1902; patent to Bynum, No. 744,480, issued November 17, 1903; patent to Lovett, No. 814,973, issued March 13, 1906; patent to Johnson, No. 837,572, issued December 4, 1906, and patent to Denison, No. 942,621, issued December 7, 1909.

The claims are for the wall, constructed of the blocks described. The blocks are provided with

longitudinal hollow spaces or voids, making the structure economical, and safeguarding against the destructive effects of moisture, heat or cold. The design of [116—96] the blocks and the construction of the wall are clearly described in the brief of counsel for the Government, as follows: "The blocks are made in full width and half widths so that the mason can break the joints in laying the wall. The void spaces in the blocks are so located that when the wall is built the webs forming the sides of the void spaces will lie always in vertical lines to make what are terms 'tiers of strain-resisting sections.' For this purpose he forms the larger or full-size blocks with two voids, each of the size of the void in the half-size block, and these are separated by a narrow void or slit corresponding to the mortar space between the two abutting blocks of the tiers immediately above and below." In the mortar space is left a narrow vertical void or slit corresponding in size to the void extending through the center of the full-sized block.

It is important to remember that appellant is claiming a wall construction, and not a particular form of hollow block. The patents referred to are for various forms of building blocks. Hollow blocks of various constructions are in general use, and numerous patents have been granted in this art. The novelty of appellant's device consists in the wall which may be constructed by using blocks of his design. Without discussing the references separately, it is sufficient to say that in no case can a wall of any desired width be constructed from the blocks of

any of the references where the voids and webs will be in perfect alinement, as disclosed in applicant's invention. In this device alone are the webs and voids of equal thickness and in perfect vertical alinement, thus forming a uniform series of voids extending horizontally throughout the entire length of the wall, and a perfectly alined series of vertical webs, thereby securing a maximum amount of strength from a minimum of weight.

The block of the Bynum patent approaches nearest to the block of appellant of any of the references. A wall constructed of [117—97] a single series of tiers of Bynum's blocks would have the voids and webs in uniform alinement and of uniform width, but the moment it is attempted to construct a wall of more than a single block in width, not only is there no method of interlocking for the breaking of joints provided, but, in the construction of the wall where the blocks are laid side by side, the vertical web will be of double width, thus destroying uniformity of width of web, which is the controlling feature of appellant's invention. Appellant's method of joining the blocks so that a void equal to that extending through the center of the block is maintained belongs to his device, and no other. This is one of the principal features of his wall construction. It is novel and marks a decided step forward in the art.

The art is a narrow one, and any step which marks so decided an advance in strength, utility and economy of construction as that here disclosed, is entitled to recognition and protection. Not only does no reference cited anticipate appellant's claims, but no



combination of the references can be devised which will accomplish this end. It is no answer that the construction of walls from hollow blocks is old in the art. A new combination of old elements amounts to invention where it produces a new and useful result, although each old element may have been suggestive of the use which could be made of it in the new. *Steiner & Voegtly Hardware Co. vs. Tabor Sash Co.*, 178 Fed., 831.

Neither can the accomplishment of appellant be attributed to obvious mechanical skill. We think there has been a clear invasion of the realm of invention, resulting in a wholly useful and novel advance in the building art. If it were doubtful, we would be compelled to resolve the doubt in favor of the inventor, and award a patent. It is easy to dispose of a case where the issue of invention is close by holding that the advance over the prior art constitutes a mere mechanical change apparent to those skilled in the art. But in the absence of proof to support this conclusion, and where the question of patentability is close, the doubt [118—98] should be resolved in favor of the applicant. *In re Eastwood*, 33 App. D. C. 291.

The decision of the Commissioner of Patent is reversed, and the clerk is directed to certify these proceedings as by law required.

REVERSED.

JOSIAH A. VAN ORSDEL,  
Associate Justice.



[Endorsed]: Patent Appeal Docket No. 1044. In the Matter of the Application of Frederick Heath. Opinion of the Court per Mr. Justice Van Orsdel. Court of Appeals, District of Columbia. Filed Jun. 1, 1916. Henry W. Hodges, Clerk.

A true copy.

[Seal]                      Test: HENRY W. HODGES.  
Clerk of the Court of Appeals of the District of  
Columbia. [119—99]

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In the District Court of the United States for the  
District of Oregon.

HEATH UNIT TILE COMPANY,

Complainant,

vs.

COLUMBIA BRICK COMPANY,

Defendant.

**Memorandum Decision of Bean, D. J.**

Memorandum by BEAN, District Judge:

Suit to enjoin an alleged contributory infringement of patent issued to complainant's assignor on February 6, 1917, for a hollow wall construction which consists of a wall with hollow blocks or tiles having web members and voids so placed and arranged that the leads are carried directly upon a line of practically vertical members, the blocks being laid on their sides so that the webs are over webs and voids over voids.

The defendant is a manufacturer of hollow tile blocks for sale to the general public. The com-

plainant's patent does not cover the blocks or material used in the wall. These are covered by prior patents. The larger block used is the same as shown in the patent of Johnson issued in August, 1905. The smaller block used in a twelve-inch wall is one in common use and substantially half the width of the larger block and practically as shown in a patent to Lovett issued in March 1906.

The principle of interlocking blocks and vertical alignment in wall construction is to be found in the patent of Denison issued in October, 1908. The complainant, however, contends that its patent is a new combination of these old elements producing an old result in a more facile, economical and effective way. That each separate element in a patent [120—100] process was old does not negative invention, which may reside in the manner in which they are assembled, since the design as a whole and the improvement it makes are what must be considered. (*Grells vs. Eugene*, 221 Fed. 68; *Barber vs. Motor Sales Co.*, 240 Fed. 723; *Foster vs. Smith*, 244 Fed. 946.) The fact, therefore, that the elements used by the complainant are old is not material for the combination is itself the entity with which we are concerned, and the question is, was the inventive faculty required for its production in the light of the prior art? "It is not enough," says the Supreme Court, "That a thing shall be new in the sense that in the shape and form in which it is produced it shall not have been before known and that it shall be useful, but it must, under the constitution and statute, amount to an invention or dis-

covery'' (Thompson vs. Boisselier, 114 U. S. 111). If the idea of the patent is merely such a combination of old elements as would occur to any practical man familiar with the prior art, no invention is involved. (Vinton vs. Hamilton, 104 U.S. 485. Hill vs. Wooster, 132 U. S. 693.)

The building of walls with hollow tiles is an old art and in my judgment it requires no inventive faculty to so lay up the individual block or tiles that the voids and webs in the several blocks will be in vertical alignment, for such would be the obvious and practical method when possible, which would readily suggest itself to one experienced in such work. Moreover, the patent of Lovett shows walls formed of hollow blocks of different sizes laid horizontally. The patent to Denison shows walls formed of blocks so laid that the webs of different courses are in vertical alignment. There could be no invention in forming a wall of the Johnson blocks laid horizontally, nor, in view of the Lovett and Denison patents, would there be invention in using with the Johnson block a smaller block of such size that the joints overlap and the webs of the several courses will be [121—101] in vertical alignment.

It follows, therefore, that the complainant is not entitled to the relief prayed for and the suit should be dismissed. [122—102]

In the District Court of the United States for the  
District of Oregon.

IN EQUITY—No. 7665.

April 7, 1919.

HEATH UNIT TILE COMPANY, a Corporation,  
vs.

COLUMBIA BRICK WORKS, a Corporation.

**Decree.**

This cause was tried by the Court upon the pleadings and the proofs, the plaintiff appearing by Mr. Harry L. Raffety, Mr. J. E. Fenton, Mr. W. D. Fenton, and Mr. David C. Pickett, of counsel, and the defendant by Mr. T. J. Geisler, of counsel. Upon consideration whereof, it is now

**ORDERED, ADJUDGED AND DECREED** that the bill of complaint herein be and the same is hereby dismissed, and that said defendant have and recover of and from said plaintiff its costs and disbursements taxed herein at \$421.74.

R. S. BEAN,  
Judge.

Filed April 7, 1919. G. H. Marsh, Clerk. [123—  
103]

In the District Court of United States, District of  
Oregon.

#7665.

HEATH UNIT TILE COMPANY, a Corporation,  
Plaintiff,

vs.

COLUMBIA BRICK WORKS, a Corporation,  
Defendant.

**Stipulation Re Printed Copies of U. S. Patents.**

It is hereby stipulated that upon the trial of this cause printed copies of United States patents may be introduced by either party with the same effect as if certified by the Patent Office, and this stipulation may be spread upon the record on the trial of the cause.

Dated, June 29, 1918.

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Of Counsel for Plaintiff.

T. J. GEISLER,

Of Counsel for Defendant.

It is stipulated between counsel for plaintiff and defendant that the foregoing statement on appeal is correct and that the same may be settled and approved by the Court.

Dated this 11th day of June, 1921.

L. L. WESTFALL,

Attorney for Plaintiff.

M. E. MACK,

Attorney for Defendant.



Settled and allowed this 11th day of June, 1921.

FRANK H. RUDKIN,

Judge. [124—104]

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In the District Court of the United States for the  
Eastern District of Washington, Northern  
Division.

No. 3390.

HEATH UNIT TILE COMPANY, a Corporation,  
Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY and  
RICHEY & GILBERT COMPANY,  
Defendants.

**Memorandum Decision of Rudkin, D. J.**

JUSTIN W. MACKLIN and L. L. WESTFALL,  
Attorneys for Plaintiff.

M. E. MACK, Attorney for Defendants.

RUDKIN, District Judge.

This is a suit for infringement of letters patent. The invention or patented device is thus described by the plaintiff:

“The invention covered by the patent in suit is a hollow wall construction as best defined by claim 2 of the patent: ‘A building wall composed of horizontal courses each formed of blocks having a single void, and other blocks having three voids arranged parallel longitudinally, the blocks being laid adjacently and

alternating with each other, the central void of the three-void block being in direct vertical alignment with the space between blocks in adjacent courses as described.' ”

The validity of this patent was involved in a suit before the District Court of Oregon prosecuted by the same plaintiff against the Columbia Brick Works, a corporation. The pleadings were the same and the evidence substantially the same, and Judge Bean held that the idea of the patent was a mere combination of old elements, such as would occur to any practical man familiar with the prior art, and dismissed the bill saying:

“The building of walls with hollow tiles is an old art and in my judgment it requires no inventive faculty to so lay up the individual blocks or tiles that the voids and webs in the several blocks will be in vertical alignment, for such would be the obvious and practical method when possible, which would readily suggest itself to one experienced in such work. Moreover, the patent to Lovett shows wall formed of hollow blocks of different [125—105] sizes laid horizontally. The patent to Dennison shows walls formed of blocks so laid that the webs of different courses are in vertical alignment. There could be no invention in forming a wall of the Johnson blocks laid horizontally, nor, in view of the Lovett and Dennison patents, would there be invention in using with the Johnson block a smaller block of such size that the joints

overlap and the webs of the several courses will be in vertical alignment.

“It follows therefore that the complainant is not entitled to the relief prayed for and the suit should be dismissed.”

I say that the records in the two cases are practically identical, because the testimony in the Oregon case was stipulated into the record in this case and was only supplemented by testimony relating to commercial value. The plaintiff was apparently satisfied with the decree in the Oregon case, as no appeal was prosecuted therefrom, and while that decree works no estoppel because the parties are not identical, yet the decision is highly persuasive. Decisions in patent cases where the same facts are involved should be as nearly harmonious as possible, and I would not feel justified in disregarding the decree of Judge Bean without much stronger conviction of error than I now entertain.

The bill of complaint is accordingly dismissed.

Filed in the U. S. District Court, Eastern District of Washington, Jan. 4, 1921. W. H. Hare, Clerk. [126]

In the District Court of the United States for the  
Eastern District of Washington, Northern  
Division.

No. 3390.

HEATH UNIT TILE COMPANY,

Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY and  
RICHEY & GILBERT COMPANY,

Defendants.

**Decree.**

This cause came on to be heard at this term, and  
was argued by counsel, and thereupon, upon consid-  
eration thereof it was

ORDERED, ADJUDGED AND DECREED as  
follows, viz.:

That the bill of complaint be and the same is  
hereby dismissed, and that the defendants have and  
recover of and from the plaintiff their costs to be  
taxed.

Dated this 27th day of January, 1921.

FRANK H. RUDKIN,

Judge.

Filed in the U. S. District Court, Eastern Dis-  
trict of Washington, Jan. 27, 1921. W. H. Hare,  
Clerk. [127]

In the District Court of the United States for the  
Eastern District of Washington, Northern  
Division.

No. 3390.

HEATH UNIT TILE COMPANY,

Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY and  
RICHEY & GILBERT COMPANY,

Defendants.

**Stipulation Re Exhibits.**

It is hereby stipulated by and between counsel for the plaintiff and counsel for the defendants, that in making up the record on appeal to the Circuit Court of Appeals for the Ninth Circuit in this cause, that in addition to the record called for, that all exhibits used at the trial of said cause in the District Court shall be certified up to the Court of Appeals.

Dated this 10th day of June, 1921.

L. L. WESTFALL,

Of Counsel for Plaintiff.

M. E. MACK,

Counsel for Defendants.

Filed in the U. S. District Court, Eastern District of Washington. June 11, 1921. W. H. Hare, Clerk. By Eva M. Hardin, Deputy. [128]



In the District Court of the United States for the  
Eastern District of Washington, Northern  
Division.

IN EQUITY—No. 3390.

HEATH UNIT TILE COMPANY,

Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY and  
RICHEY & GILBERT COMPANY,

Defendants.

**Petition for Appeal and Order Allowing Same.**

To the Honorable FRANK H. RUDKIN, District  
Judge:

The above-named plaintiff feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 27th day of January, A. D. 1921, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and prays that this appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and document upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of said Court in such cases made and provided.

And your petitioner further prays that the

proper order relating to the required security to be required of him be made.

HEATH UNIT TILE COMPANY,

By BATES & MACKLIN,

Solicitors.

JUSTIN W. MACKLIN,

Of Counsel.

Appeal allowed upon giving bond as required by law for the sum of \$250.00.

FRANK H. RUDKIN,

Judge.

Filed in the U. S. District Court, Eastern District of Washington. Mar. 5, 1921. W. H. Hare, Clerk. [129]

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In the District Court of the United States for the Eastern District of Washington, Northern Division.

IN EQUITY—No. 3390.

HEATH UNIT TILE COMPANY,

Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY and  
RICHEY & GILBERT COMPANY,

Defendants.

### **Assignment of Errors.**

Now comes the plaintiff by its solicitors in the above-entitled cause and filed the following assignment of errors upon which it will rely upon its prosecution of the appeal, in the above-entitled

cause, from the final decree, dismissing the bill in such cause, on the 27th day of January, 1921, and shows that such decree is erroneous and should be set aside and reversed for the following reasons:

1. That the Court erred in dismissing said bill.
2. That the Court erred in not granting the relief prayed in the bill.
3. That the Court erred in not holding the claims of the patent in suit valid and infringed.
4. That the Court erred in holding that a former suit before the District Court of Oregon prosecuted by this plaintiff against the Columbia Brick Works was practically identical with the suit before this court.

WHEREFORE the plaintiff prays that said decree may be reversed and that it be ordered that the plaintiff may have the relief prayed in its bill, that the patent be declared valid, and that reasonable costs be assessed against the defendant.

BATES & MACKLIN,

Plaintiff's Solicitors.

By JUSTIN W. MACKLIN,

Of Counsel.

L. L. WESTFALL. [130]

Filed in the U. S. District Court, Eastern District of Washington, Mar. 5, 1921. W. H. Hare, Clerk. [131]

In the District Court of the United States for the  
Eastern District of Washington, Northern Division.

No. 3390.

HEATH UNIT TILE COMPANY, a Corporation,  
Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY et al.,  
Defendants.

**Stipulation Re Withdrawal of Original Exhibits.**

It is hereby stipulated by the defendants, by their attorney, M. E. Mack, that the original exhibits and papers in the above case may be removed from the files by the stenographer, A. E. Kane, and by him transmitted to the attorney for the plaintiff at Cleveland, Ohio, for the purpose of preparing a record on appeal and to be returned within a reasonable time.

M. E. MACK,  
Attorney for the Plaintiff.

Filed in the U. S. District Court, Eastern District of Washington. Feb. 19, 1921. W. H. Hare, Clerk. [132]

HARTFORD ACCIDENT AND INDEMNITY CO.  
Hartford, Connecticut.

HEATH UNIT TILE COMPANY,  
Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY and  
RICHEY & GILBERT COMPANY,  
Defendants.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS,  
That we, Heath Unit Tile Company, as principal,  
and the Hartford Accident and Indemnity Com-  
pany, a corporation organized and existing under  
the laws of the State of Connecticut, and authorized  
to do business in the State of Washington, as surety,  
acknowledge ourselves to be jointly indebted to  
American Fire Brick Company and Richey & Gil-  
bert Company, defendants above named, appellees  
in the above cause, in the sum of Two Hundred  
Fifty and no/100 (\$250.00) Dollars, conditioned  
that

WHEREAS, on the 27th day of January, A. D.  
1921, in the District Court of the United States for  
the Eastern District of Washington, Northern Divi-  
sion, in a suit pending in that court, wherein Heath  
Unit Tile Company was complainant and the said  
American Fire Brick Company and Richey & Gil-  
bert Company were defendants, numbered on the  
equity docket as 3390, a decree was rendered against  
the said Heath Unit Tile Company, complainant,



and the said Heath Unit Tile Company having obtained an appeal to the Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the clerk to reverse the said decree, and a citation directed to the said American Fire Brick Company and Richey & Gilbert Company, citing and admonishing them to be and appear at a session of the United States said Court of Appeals for the Ninth Circuit Court, to be holden in the city of San Francisco, in the [133] State of California, on the 30th day of April, A. D. 1921.

NOW, THEREFORE, if the said Heath Unit Tile Company shall prosecute its appeal to effect and answer all costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

HEATH UNIT TILE COMPANY,

Principal.

By R. VALTH,

Its Vice-President.

Attest: ALWIN SWANSON,

Secretary.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

By R. J. MARTIN,

Attorney in Fact.

Approved on the 31 day of March, A. D. 1921.

FRANK H. RUDKIN,

Judge.

Filed in the U. S. District Court, Eastern District of Washington. April 1, 1921. Wm. H. Hare, Clerk. By H. J. Dunham, Deputy. [134]

In the District Court of the United States for the  
Eastern District of Washington, Northern Division.

IN EQUITY—No. 3390.

HEATH UNIT TILE COMPANY,

Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY and  
RICHEY & GILBERT COMPANY,

Defendants.

**Citation.**

United States of America to American Fire Brick  
Company and Richey & Gilbert Company:

You are hereby notified that in a certain case in equity in the District Court of the United States in and for the Eastern District of Washington, Northern Division, wherein Heath Unit Tile Company is plaintiff and the American Fire Brick Company and Richey & Gilbert Company are defendants, an appeal has been allowed the 5th day of March, 1921, therein, to the Circuit Court of Appeals for the Ninth Circuit, and you are hereby cited and admonished to be and appear in said court at San Francisco, in the State of California, thirty days after the date of this citation, to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable FRANK H. RUDKIN,  
Judge of the United States District Court for the

Eastern District of Washington, Northern Division,  
this 31st day of March, A. D. 1921.

FRANK H. RUDKIN,  
United States District Judge.

Filed in the U. S. District Court, Eastern Dist.  
of Washington. April 1, 1921. Wm. H. Hare,  
Clerk. By H. J. Dunham, Deputy. [135]

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In the District Court of the United States for the  
Eastern District of Washington, Northern Division.

IN EQUITY—No. 3390.

HEATH UNIT TILE COMPANY,

Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY and  
RICHEY & GILBERT COMPANY,  
Defendants.

**Praeceptum for Transcript of Record.**

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above-entitled case and include therein the following papers and orders:

- (1) Bill of complaint.
- (2) Answer.
- (3) Stipulation.
- (4) Such parts of the testimony in the present case and of the record of the case of Heath Unit Tile vs. Columbia Brick Works, as shall

be reduced to narrative form and agreed upon between counsel, including such exhibits as shall be agreed upon between counsel.

- (5) Opinion of Court.
- (6) Final decree.  
Stipulation as to exhibits.
- (7) Petition for appeal.
- (8) Assignment of errors.
- (9) Order allowing appeal.
- (10) Stipulation and order allowing withdrawing exhibits.
- (11) Bond on appeal. [136]
- (12) Citation.
- (13) Praeceptum of Transcript.

And order extending time to file transcript.

Deliver all papers to the office of counsel for complainant for printing.

BATES & MACKLIN and  
L. L. WESTFALL,

Attorneys for the Complainant, The Heath Unit  
Tile Company.

Approved:

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Counsel for Defendants.

Filed in the U. S. District Court, Eastern District  
of Washington. May 3, 1921. Wm. H. Hare, Clerk.  
H. J. Dunham, Deputy. [137]

In the District Court of the United States for the  
Eastern District of Washington, Northern Division.

IN EQUITY—No. 3390.

HEATH UNIT TILE COMPANY,

Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY and  
RICHEY & GILBERT COMPANY,

Defendants.

**Order Extending Time to and Including June 15,  
1921, to File Transcript of Record.**

In this cause, on application of appellant, and for a good cause shown to the Court, it is ordered that the time within which the transcript of record may be filed in the United States Circuit Court of Appeals for the Ninth Circuit be extended to and including June 15, 1921.

FRANK H. RUDKIN,  
Judge.

O. K.—L. L. WESTFALL,  
Attorney for Plaintiff.

O. K.—M. E. MACK,  
Attorney for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. May 3, 1921. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [138]



In the District Court of the United States for the  
Eastern District of Washington, Northern Division.

No. 3390.

HEATH UNIT TILE COMPANY,

Plaintiff,

vs.

AMERICAN FIRE BRICK COMPANY and  
RICHEY & GILBERT COMPANY,

Defendants.

**Certificate of Clerk U. S. District Court to Transcript  
of Record.**

United States of America,  
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing typewritten pages to be a full, true, correct and complete copy of so much of the record, papers and other proceedings as called for by the appellant in his praecipe for a transcript of the record herein, as the same remains of record and on file in the office of the clerk of said District Court, and that the same constitutes the record on appeal from the order, judgment and decree of the District Court of the United States for the Eastern District of Washington, Northern Division, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I herewith transmit the Original Citation issued in this cause.

I further certify that the cost of preparing and certifying the foregoing transcript is the sum of forty-eight and 70/100 (\$48.70) Dollars, and the same has been paid to me by Justin W. Macklin, attorney for appellant. [139]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said District, this 11th day of June, A. D. 1921.

[Seal]

W. H. HARE,  
Clerk. [140]

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[Endorsed]: No. 3701. United States Circuit Court of Appeals for the Ninth Circuit. Heath Unit Tile Company, a Corporation, Appellant, vs. American Fire Brick Company, a Corporation, and Richey & Gilbert Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed June 14, 1921.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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HEATH UNIT TILE COMPANY, a Corporation,  
*Appellant,*

vs.

THE AMERICAN FIRE BRICK COMPANY, a Corporation, and  
THE RICHEY-GILBERT COMPANY, a Corporation,  
*Appellees.*

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## BRIEF FOR APPELLANT.

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BATES & MACKLIN,  
*Solicitors and*  
*Counsel for Plaintiff.*

JOHN H. MILLER,  
JUSTIN W. MACKLIN,  
*of Counsel.*

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FILED  
OCT 13 - 1911  
FID. BOWEN  
CLERK



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# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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HEATH UNIT TILE COMPANY, a Corporation,  
*Appellant,*

VS.

THE AMERICAN FIRE BRICK COMPANY, a Corporation, and  
THE RICHEY-GILBERT COMPANY, a Corporation,  
*Appellees.*

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## BRIEF FOR APPELLANT.

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BATES & MACKLIN,  
*Solicitors and*  
*Counsel for Plaintiff.*

JOHN H. MILLER,  
JUSTIN W. MACKLIN,  
*of Counsel.*

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# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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HEATH UNIT TILE COMPANY, a Corporation,  
*Appellant,*

vs.

THE AMERICAN FIRE BRICK COMPANY, a Corporation, and  
THE RICHEY-GILBERT COMPANY, a Corporation,  
*Appellees.*

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## BRIEF FOR APPELLANT.

This is a suit under patent No. 1,215,149 granted February 6, 1917 to Frederick Heath for a **HOLLOW WALL CONSTRUCTION** and assigned directly to the plaintiff company. Certified copies of the patent, the articles of incorporation of the company, and the assignment appear in the record as exhibits.

The invention covered by the patent in suit is a hollow wall construction believed to be well defined by claim 2 of the patent.

2. A building wall composed of horizontal courses each formed of blocks having a single void, and other blocks having three voids arranged parallel longitudinally, the blocks being laid adjacently and alternating with each other, the central void of the three void block being in direct vertical alignment with the space between the blocks in adjacent courses, as described.

The defendants admit infringement of the Patent, making their sole defense one of validity. The precise

thing of the patent is admitted by counsel and the President of the defendant company to have been made since the cancellation of a license contract under which the defendant, The American Fire Brick Company, formerly operated. (Rec. Page 28).

The Richy-Gilbert Company has been brought in merely for the purpose of showing a completed wall structure made of blocks furnished by The American Fire Brick Company with the intention that they should be used in such an infringing structure.

The plaintiff seeks only to enjoin further manufacture of tiles for walls in infringing structures by the defendant The American Fire Brick Company, except by the consent of the owner of the patent in suit.

### **SOLE QUESTION IN THIS SUIT.**

**Is the Heath Wall a patentable invention or did it involve mere mechanical skill?**

The Court of Appeals of the District of Columbia held that Mr. Heath clearly entered the realm of invention. (Rec. Page 134). That Court carefully considered all the prior art which is before this Court.

### **CHARACTERISTICS OF HOLLOW MASONRY WALLS.**

The construction of hollow building walls of a load bearing character involves the consideration of many important requirements to attain economical and efficient manufacture of the blocks; ready and convenient assemblage of the blocks in the completed structure, the strength and stability of the wall produced.

The blocks must be so designed that they may be made with a minimum of waste by extruding clay through dies and cutting the column of the clay into

short sections, whereby quantity production is obtained. The blocks must be strong enough to prevent losses due to breaking of the green ware and to facilitate handling and stacking in the kilns. There should be a minimum numbers of shapes and forms of block to complete walls of various thicknesses.

Blocks should be so designed and proportioned that the workman can lay such blocks into walls with great rapidity and without special knowledge or skill.

Such a wall when finished should have a complete horizontal mortar bed for each course. The blocks in the wall should be as strong as this full width mortar bed to develop the full load bearing strength of the structure. Each course should be bonded with the next course above and below. All of the vertical webs and shells of the blocks should be in true vertical alignment with corresponding webs and shells in the courses above and below.

In the present invention, Mr. Heath has combined for the first time all these characteristics and has evolved a system of manufacture of the blocks and the construction of walls affording advantages not heretofore found in any hollow wall construction. In the Heath wall construction are provided alternating bonds transversely of the wall at every course. True vertical alignment of webs occur without special instruction of any character to the workmen; in fact, the usual habits of brick masonry produce this alignment in the Heath structure. The wall has continuous horizontal mortar beds between the courses throughout the thickness of the wall. All of the voids in the wall are sealed one from another, thereby securing more perfect insulation from heat and cold. It is proven by the record in this case that the Heath structure provides greater strength

for a given thickness of wall than any previous hollow wall construction, greater solidity due to the bonding and simplicity of the units and that unusual economies have been effected from the time the clay is extruded from the die in the form of these blocks until the blocks are laid up in the complete Heath wall.

### HISTORY OF THIS INVENTION.

Mr. Heath is an eminent architect. In the course of his work he had made a study of various forms of hollow tile wall constructions and had specified and recommended the use of various hollow wall constructions including Denison patented hollow tile (one of the alleged anticipations). Mr. Heath knew the difficulties encountered in the manufacture and laying up of this Denison T-shaped tile. Appreciating the disadvantages of this and other load bearing tile made prior to his invention, to avoid these disadvantages formerly encountered, and to accomplish new advantageous results, he first devised a **three void block** (termed "double block") with a narrow intermediate void between two vertical webs and **of proportions not previously used anywhere**. However this gave him only one thickness of wall. At a later time while studying over the problem of increasing the thickness of the wall and retaining the horizontal mortar bed and alignment of webs and necessary bonds, he conceived the idea of combining with this three void block another block, a **single void block** of such size and proportion that when placed in position it would have its two vertical webs in vertical alignment with the corresponding webs of the double blocks, and have its upper and lower surfaces continue the horizontal mortar beds. He found that this formed the bases of a system



of wall construction having all the desired characteristics of the **ideal hollow wall**.

Mr. Heath then filed an application for a patent on his wall and after a rejection of the present claims of the patent by the Commissioner of Patents, he took an appeal to the Court of Appeals of the District of Columbia. Here for the first time both sides of the case were argued, with the blocks and actual wall constructions before a tribunal—counsel for the Government opposing the grant upon the same prior patents before this Court. The decision of that court ordered the Commissioner to issue the patent in suit. A certified copy of this decision has been made of record in this case (Rec. Page 131). Following the issuance of the patent, suit was filed by the plaintiff, seeking to enjoin the Columbia Brick Works, et al., at Portland, Oregon, for manufacturing a tile and causing walls to be built of an entirely different character from those manufactured by the appellees hereof. In that decision, (Rec. Page 135), Judge Bean of the District Court of Portland, dismissed the bill saying that the complainant was not entitled to the relief prayed for.

The Portland case was not appealed because infringement was not there proven. The defenses in the Portland case have been used by agreement in the present case and defendant here relies upon the defenses there set up.

### **DIFFERENCES BETWEEN THIS SUIT AND THE PORTLAND SUIT.**

The memorandum decision of Judge Rudkin, (Rec. Page 140) the Court below in this case, quotes from Judge Bean's decision in the former suit under the Heath

patent and dismisses the bill because he feels that the two cases are practically identical. He says, very properly, decisions in patent cases where the same facts are involved should be as nearly harmonious as possible. He did not feel justified in disregarding Judge Bean's decision.

The Court below was mistaken in holding that the two cases were practically identical. The two cases are very different. In the former case, the defendant's structure was very different from the defendant's structure here. The structures proven to have been built by the defendants in the **Portland** suit did not even have vertical alignment of webs, which is so essential to the success of the present invention and so specifically called for by the patent. This may be seen at a glance by referring, for example, to defendant's exhibits, photographs Nos. 15 and 22. There each course had a large block of **three equal voids** and a small block of **two voids** one over the other and it could not be proven that these blocks were laid up with any but the outside webs in alignment.

The Patent at that time was much too young to make any material showing of commercial success. There was **nothing in the Portland case** to show the relative value of this invention compared with those of prior art.

In the present case we have a very extensive showing of commercial success not present in the Portland case. We have a construction manufactured by the defendants identical with that of the patent. We have a large number of witnesses including masons, contractors, eminent construction engineers, and manufacturers of clay products, all familiar with the tile industry, testifying as to the great advantages of the Heath wall construction. None of this was present in the Portland case.

The testimony of the Portland case has been stipulated into the present record and appears in abbreviated

narrative form in the transcript, pages 95 to 130. The balance of the record, similarly abbreviated, particularly pages 25 to 94 inclusive, constitutes new evidence in the present case of the very extensive commercial success and great value of the Heath invention. None of this was in the Portland case.

Therefore, Judge Rudkin was in error in holding that the records in the two cases were practically identical. They are indeed widely different. The only portions of the records in the two cases which are common are the defenses of the prior art patents (which were the same as those which were before the Patent Office), and oral statements of witnesses after having seen the Heath structure. Whereas in the present case we have twenty-six witnesses from different parts of the country, representing all branches of the art of hollow wall construction, testifying as to the great success, commercial value and pronounced advance which Mr. Heath has made in the art by this invention.

It is believed that perhaps Judge Rudkin on reading the defendant's brief in this case was misled by some of the inaccurate statements therein. For example, defendants' counsel stated that a large number of witnesses, naming them, testified that everything in the Heath patent was known in the art long before Mr. Heath obtained his patent. This is decidedly a misstatement. The only witness who even made a statement remotely corresponding to this was E. V. Johnson, who upon being handed the Heath patent said that "I don't see anything in that particular assemblage of blocks that was not a known factor to me both in practice and in theory." It is notable that neither Johnson nor any of the witnesses says he ever saw a wall like the Heath wall before Heath's invention. These other witnesses were each tes-

tifying as to some particular feature such as laying of tile horizontally or the vertical alignment of webs.

Counsel says in his brief that "the Johnson block was the same as the Heath block." This is not the case. Witnesses who knew the Johnson block said that it was **similar to one of the Heath blocks**. Johnson had only one block which could be similar to one of the Heath blocks. The Counsel states in his brief that the plaintiff, Heath, is the only witness testifying as to the patentability of his wall and that no one expert is asked "Is it invention or mechanical skill?" As a matter of fact a large number of witnesses in the present case are testifying for the plaintiff on this very subject as will be quoted later in this brief.

Counsel at the hearing objected to testimony (Rec. Page 37), "Why have you not licensed the great eastern states"? (Mr. Mack: "I object to that as immaterial." Court: "I will sustain the objection"), and then in his brief capitalizes the point, saying that Heath wall tile were manufactured only in three states, and compares it to the Johnson and Denison blocks which had been manufactured for years prior to the Heath invention.

It is notable that neither of the District Courts, in the two suits under this patent, declared the patent invalid. The first dismissed the bill without passing upon the point of validity, and the second—the court below—followed the other court, erroneously believing that the cases were identical.

## DEFENSES.

The defense here sets up the same patents and alleged prior uses which were before the Patent Office, the Court of Appeals of the District of Columbia and the District Court at Portland. It is notable that



throughout all this contest not one single statement is made of any actual wall exactly or nearly like the Heath wall. **Not one single use of the thing of the Heath patent is even alleged.** The defendant is forced to rely upon oral statements of its prejudiced witnesses, that the Heath patent presents nothing new. They attempt to wave it easily aside, saying that it is the "obvious way" to do this thing. Yet, the defendant in the present case pays tribute to the invention by using the precise thing of the patent after attempts in the past to market other hollow load bearing wall tile. The defense in so speaking of the invention and in urging its great simplicity overlooks a long line of leading cases to the effect that:

**Simplicity Emphasizes Merit of Invention.**

**"The combination is apparently very simple; but the simplicity of an invention so far from being an objection to it may constitute its great excellence and value."**

(Justice Storey in **Ryan vs. Goodwin**, 3 Summer, 514).

Instead of detracting from the merits of this invention, the simplicity of the Heath wall construction emphasizes the fact that invention was required to make it.

In **Regent Manufacturing Company vs. Pennsylvania Electric**, 121 Fed. Rep. 80, the Court of Appeals of the Seventh Circuit in sustaining the patent for a mirror frame, all of the elements of which were old, says:

**"The device seems exceedingly simple. But its very simplicity, in such an old field should be a warning against too ready acceptance of the ex post facto wisdom of the bystander."**



### The Johnson Defense.

Mr. E. V. Johnson of Chicago, in the **Portland** case was an antagonistic witness, called for the purpose of defeating this patent. He is a rival of Mr. Heath in business, and, with the Heath patent before him, testifies at great length as to the simplicity of the Heath wall. By stretches of imagination, in answer to hypothetical questions, he gives various answers to the effect that it is not an invention.

The Johnson deposition refers particularly to a block illustrated in his patent No. 837,572 issued December 4, 1906. (Def.'s Exhibit "Johnson Patent") That Johnson patent shows a block similar in contour to one of the blocks of the Heath wall, but of very heavy construction, it being designed to be set on end in wall structures. The Johnson patent teaches placing these blocks with the voids vertical. The blocks are comparatively short and the patent illustrates them arranged in a column construction. There is no assemblage of blocks illustrated in the patent nor alleged by Johnson corresponding to the Heath structure. There is nothing in his patent nor in his entire deposition even remotely suggesting the Heath wall, prior to Mr. Heath's invention.

Johnson testifies (Rec. Page 115) that it was "common practice" to lay tile horizontally or vertically but states that laid flat the blocks do not develop their full strength. He devotes considerable time to the reasons why the Johnson tile should be placed vertically in the wall.

The walls referred to in the Johnson deposition as having been built before Heath's invention, were either mere partition walls or walls built in accordance with the Johnson patent, (Rec. Page 116), in either case being one block thick. He says "I have uniformly recom-

mended the end section or vertical section system of construction." Rec. Page 117 indicates that he has carried out this principle since 1903 or 1904. He speaks of his catalogue (Def. Ex. Page 46 "National Fireproofing Co.'s Catalogue") showing vertical columns made of his blocks. (Rec. Page 118). He states (Rec. Page 119) that the hollows or voids run vertically and says (Rec., page 119) that a 12 inch wall would be laid the same as shown in his catalogue whether laid on the end or laid on the side.

Attention is directed to this exhibit. It shows a vertical column and to lay that column horizontally would not meet the claims of the Heath patent and would not provide the simple uniform construction of the Heath wall. He answers in response to a hypothetical question (Rec. Page 120), again drawing upon his imagination, that an ordinary bricklayer would lay one course and then "bust the tile in two" to complete the thickness of the wall. But, going on through his deposition, it is questionable whether even this imaginary wall as he has described it would have been a Heath wall or not.

At the time of Heath's invention, the Johnson block would not have suggested Heath's wall because Johnson's patent and his practice, teach vertical construction of walls where the blocks are each the full thickness of the wall, except for columns, where the grouping of the blocks is not adaptable to horizontal construction. Furthermore the Johnson block at that time was of such thick web and shell construction that it would not be convenient to break it. Even if told to break these heavy tile the mason would not, by any means, necessarily accomplish all the valuable features of the Heath patent. Johnson testifies under cross examination that he al-

ways recommends arranging these blocks vertically (Rec. Page 125). "I certainly should; if it was a load-carrying wall I would." **This patent is concerned only with load-carrying hollow walls.**

Where Johnson has built walls with horizontal construction, he states that such walls carry no weight and that the blocks usually have one dimension corresponding to the thickness of the wall (Rec. Page 124). Mr. Heath's wall must have two different blocks in each course.

Such testimony can not avail to defeat this patent for two reasons, first, it does not meet the construction called for by the claims, and second, as was said in the case of the **National Hollow B. B. vs. Interchangeable B. B. Company**, 106 Fed. Rep. 693, Court of Appeals, Eighth Circuit:

**"Unsupported oral testimony of prior use is always open to suspicion and cannot prevail over the legal presumption of validity which accompanys the patent, unless it is sufficient to establish such a use beyond a reasonable doubt."**

It is submitted with respect to the Johnson deposition, and other testimony, in the record, that if the Heath construction as shown in the patent were the natural ordinary method of construction, which any brick-layer could without instruction make,—surely, somewhere out of the liberal field of recollection of these many witnesses, the Defense could have at least prompted the mention of a wall which would have sounded like an anticipation.

It is notable that Mr. Johnson's large organizations in Chicago still follow the universal practice of end or vertical construction. His scheme of wall construction requires many forms (nineteen different shapes and sizes are shown in his catalogue) where the blocks are

each of the full width of the thickness of the wall. Out of Mr. Johnson's thirty-eight years of experience, he does not name a single wall embodying the features of the Heath patent, nor allege a construction which would anticipate its claims, but contents himself with waving his hand at this meritorious invention and saying (Rec. Page 124) "I don't see anything in that particular assemblage of blocks that was not a known factor to me both in practice and in theory." Even under cross-examination he fails to mention such an actual wall, his catalogue never illustrated such a wall, and he states with positiveness that he never recommended such a construction. The reason is that it never occurred to him to make such a wall. **Now that it is done, with the ex post facto wisdom of a bystander, he testifies in a manner which should fill the Court with gravest doubts as to the actuality of the walls he pictures.**

### **The Denison Defenses.**

The Denison defense alleges invalidity of the patent because of the Denison patent reissue No. 13,299. The patentee of this patent and his son, George W. Denison, in business with him, are rivals of the appellant, manufacturing the Denison block, which the testimony shows is being supplanted by the Heath structure. As might be expected, they alleged no invention in the Heath wall. Of course this defense must be considered separately from the Johnson defense. The one can not be used to bolster up the weaknesses of the other, to defeat this patent in the suit. (**Dodge vs. Post**, 76 Fed. 807). The witnesses in the trial at Portland, and as quoted in the record here, were testifying both in depositions and in open court to independent and unallied practices which in no instance even purported to be a complete antici-



pation of the Heath Wall construction. One witness testifies it was common practice to lay hollow tile flat, another that it was common practice to make cross bonds, (which would apply to tile or brick) and another that it was common practice to produce alignment of webs as shown in the Denison patent.

The Supreme Court in the case of **The Barbed Wire Patent** (134 U. S. 75) in disposing of various alleged uses of barbs for wire fences, one use sworn to by 24 witnesses, another by a large number, and so on:

“The doctrine laid down by this court in **Coffin vs. Ogden**, 85 U. S. 18, Wall 120, 124, that ‘the burden of proof rests upon him’ the defendant, and ‘every reasonable doubt should be resolved against him.’ If the thing were embryotic or inchoate; if it rested in speculation or experiment; if the process pursued for its development had failed to reach the point of consummation, it cannot be offered to defeat a patent founded upon a discovery or invention which was completed, while in the other case there was only progress, however near that progress may have approximated the end in view.”

It has been well stated in **Dodge vs. Post**, 76 Fed. Rep. 807, at page 810:

“It is hardly necessary to say that each defense must be considered independently of all others and so considered must fail unless it be established by proof beyond a reasonable doubt.”

The Denison patent and the admitted Denison wall construction, show a system of making the body of the wall with a single T-shaped block, laid first one way and then reversed, resulting in three separate narrow mortar beds for each course. This requires the use of great care to secure vertical alignment of webs, it requires unusual uniformity of blocks. If they be irregular or warped in the making, however slightly, the



strength of the walls is impaired. The Denison wall requires special blocks of various shapes and sizes to start and finish a course, to close corners, pilasters and jambs, etc. We fail to see what possible application the Defense can properly make of this patent to anticipate the Heath patent. It has been urged as an anticipation because it is a hollow tile wall having an alignment of webs, and the Defense leaps the gap, between such a use and the Heath wall, by saying that to make the Heath wall, in view of the Denison patent requires no more than mechanical skill. The Denison patent had been practiced quite extensively for years before the Heath invention and without change. It is notable that it was to correct inherent faults and to improve and simplify the Denison construction, that Mr. Heath made his invention, a simplified economical wall construction.

We find in **Walker on Patents** a statement which applies well to the Denison defense and to the Johnson and others. (**Walker on Patents**, Sec. 26, P. 28):

“But it does not tend to prove want of invention to show that a skillful mechanic who has seen the patented thing can reconstruct some older thing so as to make it similar to that covered by the patent.”

**Beach vs. Box Mfg. Co.**, 63 Fed. Rep. 601.

**National Co. vs. Belcher**, 71 Fed. Rep. 879.

In the Denison testimony we find unsupported oral statements of a wall evidenced by a sketch made by the witness, and relating to no particular wall construction. Even by this elastic method of securing evidence, after the Heath patent has been before the witness, we do not have an anticipation, because of the failure to show web alignment as called for by the Heath patent.

Denison and Johnson and the defense witnesses who testified in open court at Portland, were perhaps more justified because a much broader interpretation of the patent claims was there being urged to cover the very different structure of that defendant. Such testimony is not properly applied in the present case where the Court need only consider the patent in its narrowest interpretation, because the defendant is using the precise thing of the patent.

We draw from the testimony of the defense a tribute to the Heath invention. Examining the various alleged prior uses, which are not proven in any sense, and the admitted uses such as Denison and Johnson, we find that considerable effort is expended in making an unusual shaped tile, and special care and supervision of the workmen are necessary to get the vertical web alignment, or else the web alignment and strength of the walls is sacrificed. With the Heath patent before them, the witnesses, one testifying as to one particular feature and one as to another, all find as to their particular feature that the Heath wall embodies it in the most natural and effective manner.

### **Other Witnesses.**

Various other witnesses of the defense, quoted from in defendant's brief below, need no reply except to call attention to the fact that each of these witnesses is testifying orally with the Heath wall construction before him, and with the ex post facto wisdom of the bystander, one says as to one feature that it is "common practice," another as to another feature that he has "seen it before," and another witness as to still another characteristic of the Heath wall that he has done "something like that for years." Witness Klose, (Rec. Page 97) qualifies his statement that he can see nothing new in the Heath

construction, by saying "unless he could make a tile which was absolutely select as to size," commenting that to select the tile as to size would be prohibitive. We may make reply to this most simply by calling attention to the record of the witnesses who are testifying as manufacturers of Heath tile, that they have without exception found it to be the most satisfactory wall construction.

Through all this strenuous effort to anticipate the Heath patent by these various witnesses called and prompted to that end, we find no evidence even remotely approximating that character of evidence required to defeat a patent. This Court in the case of **Los Alamitos Sugar Company vs. Carroll**, 173 Fed. Rep. 280 held:

"it is not sufficient to constitute an anticipation that the devices relied upon might, by a process of modification, reorganization or combination with each other be made to accomplish the function performed by the device of the patent."

**Topliff vs. Topliff**, 145 U. S. 156;

**Gunn vs. Bridgeport Brass Co.**, (C. C.) 148 Fed. 239;

**Ryan vs. Newark Co.**, (C. C.) 96 Fed. 100;

**Simonds R. M. Co. vs. Hathorn Mfg. Co.**, (C. C.) 90 Fed. 201-208;

**Gormully & J. Co. vs. Stanley Cycle Co.**, (C. C.) 90 Fed. 279;

**Morrow vs. Shoemaker** (C. C.) 59 Fed. 120.

This Court also held in the case of **Stebler vs. Riverside Heights Orange Growers' Assn.**, 205 Fed. Rep. 735:

"True, we may pick out one similarity in one of these defenses, and one in another, and still one in another, and by combining them all, anticipate the inventive idea expressed in the **Strain** patent, but the combination constituting the invention is not found in any one of them."

We submit that the present case is in strict parallelism with the case just quoted, and the following line of authorities:

- Morton vs. Llewellyn**, 164 Fed. 693, 90 C. C. A. 514;  
**Wilkins Shoe B. Co. vs. Webb** (C. C.) 89 Fed. 982;  
**Krementz vs. Cottle Co.**, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558;  
**Western Elec. Co. vs. Chicago Co.**, (C. C.) 14 Fed. 691;  
**Star Brass Co. vs. Gen. Elec. Co.**, 111 Fed. 398, 49 C. C. A. 409;  
**Union Biscuit Co. vs. Peters**, 125 Fed. 601, 60 C. C. A. 337;  
**St. Louis Flushing M. Co. vs. American Co.**, 156 Fed. 574, 577, 84 C. C. A. 340.

It is accordingly held that the defense of anticipation is not sustained.

### **Patents in the Answer.**

In the answer the defendant sets up several patents which need only be mentioned briefly. They have relied principally upon the Johnson and Denison prior patents. Judge Bean mentioned in his decision the Lovett patent. This mention is quoted in Judge Rudkin's decision. We need say nothing more concerning the Denison and Johnson patents.

In the Lovett patent each course consists of two single void blocks. The alignment of the webs is only at the outer tiers and in each course the smaller block has its web directly over and beneath the voids in the course below and above. The claims of the Heath patent can not be read upon this Lovett patent. Heath's patent claim calls for "horizontal courses each formed of blocks having a single void and other blocks having three



voids." The claim further calls for the central void of the three void block being in direct vertical alignment with the space between the blocks in adjacent courses.

The other patents may be disposed of briefly in the order named in the Answer.

The Bynum (No. 744,480) patent shows hollow tile laid horizontally, one block wide to each course, with no suggestion of alternating bond, and the construction is not capable of increasing the thickness of the wall and does not meet the Heath claims. The same thing applies to the Thomson patent (No. 222,211), which does not even have horizontal mortar beds required by the Heath claim. Fisher (No. 781, 431) is a very remote construction having no suggestion of vertical web alignment nor of three void and single void blocks. Yarnall (No. 695,594) shows a sewer pipe block having eight parallel longitudinal voids, not at all adapted for the Heath wall construction. Fisher (No. 817,478) has no suggestion of single void or three void blocks, nor vertical alignment of webs, called for by the Heath claims.

### COMMERCIAL SUCCESS.

Where the validity of the patent is in doubt, the doubt should be resolved in favor of the patent upon a showing of commercial success. The record in the present case includes very extensive and enthusiastic testimony as to the unquestioned commercial success of Mr. Heath's invention. This we believe was overlooked by the Court below. In **Morton vs. Llewellyn**, (164 Fed. Rep. 693), this Court sustained the patent over a defense of invalidity for want of invention, in view of certain alleged prior uses, by favorably resolving the doubt upon a showing of commercial success, considerably less imposing than the proven success of the present invention. The plaintiff there testified that he had sold (apparently over a period of years) \$30,000 worth of fittings, and



that they had been used quite extensively, superceding the old style of double fittings, and that he was sending them to Portland, Victoria, San Francisco and San Jose. The Court said:

**“We find no contradiction of this testimony in the record. Apart from the presumption of novelty that always attends the grant of a patent, the law is that where it is shown that a patented device has gone into general use, and has superseded prior devices having the same purpose, it is sufficient evidence of invention in a doubtful case.”**

**The Barbed Wire Patent**, 143 U. S. 275, 292, 12 Sup. Ct. 443, 36 L. Ed. 154;

**Keystone Manufacturing Company vs. Adams**, 151 U. S. 139, 143, 14 Sup. Ct. 295, 38 L. Ed. 103;

**Irwin vs. Hasselman**, 97 Fed. 964, 38 C. C. A. 587;  
**Wilkins Shoe Button Company vs. Webb**, (C. C.) 89 Fed. 982;

**National Hollow B. B. Co. vs. Interchangeable B. B. Co.**, 106 Fed. 693, 707, 45 C. C. A. 544.

The testimony in the present case, not before the Portland Court, shows this invention is successful in various foreign countries as well as the United States, and that it has superseded largely or entirely other tile wall constructions. Frost testimony (Rec. Page. 73).

**“A very large increase in the demand and production of Heath tile was effected during 1919 and 1920, which has very largely replaced both Denison tile and common brick. The former has not been manufactured in commercial quantities for the last six months or more.”**

Mr. Frost is the President of the Los Angeles Pressed Brick Company and he further testifies that during a period of the first nine months of 1920, he had to decline a large amount of business in Heath hollow tile,

even though in that period his company manufactured sixteen thousand tons of Heath tile. (Rec. Page 74). This is the cubic equivalent of seven and one half million common brick. It is only fair to state that Mr. Frost is referring to the territory covered by his license agreement, when he mentions superseding the Denison tile. His concern formerly manufactured the Denison tile, and changed to the Heath construction because,—“of these tiles we considered the Heath tile the best from the manufacturers and builders standpoint.” (Rec. Page 72).

**Mr. Oudin, president of the Defendant Company,** The American Fire Brick, testified he **changed from manufacturing Denison tile to the Heath wall tile.** (Rec. Page 28). He says “**we investigated the Heath tile and found it far superior to the Denison tile.**”

Mr. Mathews, President of the Denny-Renton Clay & Coal Company of Seattle, testifies that after manufacturing hollow tile for load bearing walls, and after an “exhaustive investigation as to the merits of the Heath tile, in comparison with other hollow building tile, decided that for load bearing walls the Heath tile was superior to all others on the market.” (Rec. Page 59). A plant superintendent of this same company, Mr. Cake testifies that they made the equivalent of approximately a quarter of a million double tile and the necessary singles the first six or eight months after they started.

Appellant has similar testimony by other witnesses in other parts of the country.

In San Francisco Mr. G. D. Clark, of N. Clark and Sons, says (Rec. Page 91):

“In the past ten years we have been in search of a hollow building tile, the pattern of which would be easy and economical to manufacture and at the same time meet every need in wall construction.

Several patented tile were presented for our consideration, among which were the Hercules, Hun, Denison and others, but in each instance their impracticability was manifest and in consequence abandoned. Within the last two years we learned of the Heath building tile and found that it possessed the requirements of a tile for which we had been searching, and we thereupon obtained exclusive right to manufacture and sell Heath tile in Northern California and the Hawaiian Islands.

This brings the case into complete conformity with cases decided by this Court for example, **Stebler vs. Riverside Heights**, *supra*, and **Bliss vs. Spengler**, 217 Fed. Rep. 394. In the latter case this Court said:

“It is manifestly not a contrivance that the ordinary mechanic would devise in the application of known elements. Otherwise, why was it not struck upon before?”

Other witnesses who speak of the commercial success and satisfactoriness of the Heath wall construction, found right here in San Francisco, are merely indicative of activity elsewhere. For example, Harry E. Drake, a masonry contractor, speaking of building various government buildings, says that they changed from ordinary hollow building tile to Heath tile because the army engineers considered the latter a better construction. Speaking of another building in Oakland he said Heath tile were given preference on account of load saving on concrete beams. He says:

“They have no difficulty in gaining alignment of webs in the use of the Heath tile, none whatever; that is taken care of in the design and arrangement of the tile.”

The witness Knudsen and others refer to photographic exhibits, of record, showing buildings having

walls of load bearing character, constructed of the Heath tile, in this vicinity.

Mr. Heath's invention is admittedly a narrow one but the fact that it has been used extensively in the United States and foreign countries, (Heath testimony Rec. Page 36 and 37) without change from the design of the inventor, and without advertising except for small pamphlets such as are introduced as exhibits, brings the circumstances of this case within the doctrine laid down by the Supreme Court in the **Minerals Separation L't'd. vs. Hyde**, 242 U. S. 261, at page 270. This Court had found explanation for the great success of that invention in an expenditure of \$60,000 to introduce the process in the United States, and at the time of the hearing before this Court it had not been introduced into the United States. In the present case, the advertising is very meager. The invention has been successful because of its merits alone. The Supreme Court in the case just mentioned cites some of its prior decisions as follows:

**Diamond Rubber Co. vs. Consolidated Rubber Tire Co.**, 220 U. S. 428;

**Carnegie Steel Co. vs. Cambria Iron Co.**, 185 U. S. 403, 429, 430;

**Smith vs. Goodyear Dental Vulcanite Co.**, 93 U. S. 486.

### **PATENTABILITY OF HEATH INVENTION.**

Is the Heath wall construction as disclosed in his patent, granted after a consideration of all of the prior art in the present case and before the Court at Portland an "invasion of the realm of invention," as termed by the Court of Appeals of the District of Columbia, or is it



mere mechanical skill? We hold that the record contains an abundance of proof that the Heath wall construction was something which mechanics, engineers and architects and building contractors had been striving for but had not accomplished.

To guide the Court in determining whether the Heath wall is invention or mechanical skill, we will quote from witnesses in various vocations in the manufacturing and building arts relating to wall constructions.

In the Portland case, various witnesses each testified that some part of the Heath wall was old to them, or was the natural way to lay hollow tile, but, may we again point out that not a single instance of such a wall is presented by the defendant in that case nor in the present case. In the present suit, a large number of witnesses, many of whom qualify as experts, some of whom have laid the tile with their own hands, and others of whom are architects, engineers and contractors, as well as manufacturers, say that they consider the Heath tile the "best wall construction" and that "it is an advance in the art of better masonry," and that "it is an invention."

Mr. Oudin, president of the American Fire Brick Co. defiantly admitted "We have investigated the Heath tile and found it far superior to the Denison tile for the reason that the Denison tile required for a 12 inch wall seven distinct pieces of tile, whereas the Heath tile required only three pieces. Other advantages were the rapidity of putting it into the wall on account of it being square and not of odd shapes, the way the Denison tile was." (Rec. Page 28). Mr. Oudin is a large manufacturer of clay products with many years' experience in the industry. It is striking that he accepts without



change the Heath construction after using other forms of wall tile. It never occurred to him, before the tile were brought to his attention, to make such a construction, yet he testifies that it is far superior to another tile which he paid for the privilege of manufacturing.

Mr. E. J. Mathews, president of the Denny-Renton Clay & Coal Company after comparing it favorably with other wall constructions, said:

**"I consider the design of the Heath tile a meritorious invention, as it required that the fullest consideration be given, first, to the matter of reducing to the minimum the manufacturing difficulties and losses; and second, to producing a tile, which when laid in the wall, no matter how placed, would always have the webs in vertical alignment and thus develop the maximum load bearing capacity. These things could not have been accomplished by mere minor mechanical changes in the form of the hollow building blocks which have been in use for many years, nor could they have occurred accidentally nor in any way except by exhaustive study and planning."** (Rec. Page 60).

Mr. J. R. Gwynn, manager of N. Clark & Sons, San Francisco, licensed manufacturers of tile for Heath walls, says (Rec. Page 88):

**"The tile are ingenious to say the least. Until Mr. Heath's inventive genius was brought to bear, the building world had no such means of wall construction in hollow building tile. It has been regarded as an advance in the art of better masonry."**

Mr. E. Zimmerly, an eminent construction engineer, who after building many other forms of hollow walls including Denison and Johnson, asked if the design of the Heath system of wall construction were something any mechanic or engineer could do if called upon, says (Rec. Page 65):

“I think it is an invention. It required study in order to do that. It is all very easy to say after you have seen a thing, that anybody could do it.”

Mr. F. R. Boedecker, a contracting brick mason, after describing many advantages of the Heath wall not found in and other constructions states (Rec. Page 42) that he uses Heath Tile because he thinks “It is the best construction.” He makes a direct comparison (Rec. Page 43) as to advantages of Heath wall over Denison wall.

Mr. E. N. Dugan, whose occupation is that of an architect familiar with various forms of wall constructions including Denison, says (Rec. Page 50) he does not consider;—

“the design of the Heath wall within the development of the ordinary mechanic or architect, but the result of the discovery of principles which have been fully recognized and carefully worked out and developed into a system of construction heretofore unknown.”

Mr. James Fisher, agent for the Denny Renton Clay & Coal Company of Seattle, familiar with various forms of wall construction, after stating that he has a bigger demand for Heath than any other lines of wall construction, says (Rec. Page 54):

“it is giving entire satisfaction in this part of the country. It is considered a great improvement \* \* \*.”

We refrain from burdening the Court with further quotations on this subject, but, twenty odd other witnesses heartily endorse, recommend, and without qualification, pay highest tribute to the Heath wall construction.

(No such testimony was produced in the Portland suit).

The only contradiction we find of the statements just quoted, throughout the record of the contest regarding this patent, is that various of Defendants' witnesses, after being shown the Heath patent say that they had laid other tile horizontally, that they had made similar bonds, and that it was the "natural way to do it." It is pertinent to again say that through all these presently prepared mental pictures drawn to defeat the patent, **not a single example of such a complete wall construction before Heath's invention, is named,** much less proven by that character of evidence, clear and convincing beyond a reasonable doubt, such as is required to invalidate a patent.

### **SUMMARY OF EVIDENCE.**

Considering both sides of this suit, on one hand it is an invention, a composite wall construction, which after contested consideration, was found by the unanimous opinion of the Court of Appeals of the District of Columbia to be patentable over the exact forms of prior single tile and wall constructions which are before this Court.

This invention was developed to fill an existing want. It was evolved, simplified and completed and put into practice and accepted largely and successfully used by manufacturers, building engineers and architects.

It is admitted to be exceedingly simple, which we hold constitutes its great excellence and value. It is this very simplicity which has made it such a great success. **The principal defendant in this case had ceased to manufacture one of the principal forms of wall construction alleged as an anticipation of this invention to become a licensee under the patent in suit.** In various parts of the country we find this wall construction not only suc-

cessful but actually superseding other forms of hollow tile construction.

We have on the other hand, statements, made in self interest that this patented wall involves no invention because they have laid hollow tile on the sides, they have made bonds, or that the Johnson tile could be laid on the side. But, as against this, we find Johnson himself, out of nearly forty years of experience stating that he would recommend placing his tile on end, and we find his great company manufacturing many different forms of tile to be placed in vertical position in walls, each tile to be the whole thickness of the wall. The nearest similarity, even to some of the features of the Heath wall construction, is found in his column construction illustrated in Johnson's Patent and Catalogue.

It is admitted that some characteristics of the Heath wall follow former practices of masonry. This very fact promotes its ready adoption.

The bonding at every course, is found in one form of brick work and is as old as the use of bricks. The horizontal mortar beds is also a feature used in brick work. The laying of brick horizontally and vertically is admitted to be common practice within the discretion of the mechanic. But it is the completed wall, the system of construction, the **tout ensemble** of the Heath invention which results in a wall of great simplicity; economies from the time the clay leaves the dies until the wall is completed; high degree of load-bearing characteristics; rapidity with which the wall may be built; great simplicity with which offsets, corners and jambs can be fitted into the uniform courses; universal and continuous automatically resulting vertical alignment of load-bearing webs; the complete closing of the voids in each course from adjacent voids, providing the highest



possible degree of insulation. All of these combine to make up the Heath wall construction.

In **Dubois vs. Kirk**, 158 U. S. 58, the Supreme Court sustained the following claim:

“A bear-trap dam having a releasing or open sluice extending from under the gates so as to relieve them from unnecessary pressure, substantially as and for the purpose described.”

Bear-trap dams were admitted to be old. Sluices or waterways were a common and well-known method of relieving pressure on other dams. The Supreme Court, in passing on the patent, said:

“The **Kirk** invention is undoubtedly a very simple one, and it may seem strange that a similar method of relieving the pressure had never occurred to the builders of bear-trap dams before; but the fact is that it did not, and that it was not one of those obvious improvements upon what had gone before which would suggest itself to an ordinary workman or fall within the definition of mere mechanical skill. It was in fact the application of an old device to meet a novel exigency and subserve a new purpose.”

In case **Krementz vs. Cottle**, 148 U. S. 556, the Supreme Court said:

“It is not easy to draw a line that separates the ordinary skill of a mechanic, versed in his art, from the exercise of patentable invention, and the difficulty is especially great in the mechanic arts, where the successive steps in improvements are numerous and where the changes and modifications are introduced by practical mechanics.”

In this case the simplified, single piece collar button, however, was held to have obvious advantages over previous devices of the kind. There circumstances were



analogous to those in the present case, as the record shows that it was common practice to do almost the thing of the invention in one case, and in one another, but the Court, citing **Webster-Loom Company vs. Higgins**, 105 U. S. 580, **Topliff vs. Topliff**, 145 U. S. 156, and others, said:

“Now that it has succeeded, it may seem very plain to anyone that he could have done as well. This is often the case with inventions of the greatest merit.”

The Court of Appeals in the Seventh Circuit said in the case of **Faries Mfg. Company vs. George W. Brown & Company**, 121 Fed. Rep. 547:

“The eye that sees a thing already embodied in mechanical form gives little credit to the eye that first saw it in imagination. But the difference is just the difference between what is common observation and what constitutes an act of creation. The one is the eye of the inventive genius, the other a looker-on, after the fact.

All through the decisions of the Courts runs the theme that the inventor who has supplied a want by a simple, happy thought, is a greater public benefactor than the one who has contrived a complex means for accomplishing the object. And while the simplicity of the Heath wall may be seized upon by this defendant as a ground for declaring against its patentability, the Court will consider it as evidence of inventive genius.

### CONCLUSION.

We submit in conclusion, that the decision of the Court of Appeals in the District of Columbia holding that the invention is a patentable one, is supported and reinforced not only by the decisions here cited, but by the record of the case before the District Court of Port-

land, Oregon, and the extensive showing of success before this Court.

There is not a single instance of anything new having been produced by the defendant, in the prior case nor here, which was not before the Court of Appeals of the District of Columbia, except unsupported oral testimony of those who have first seen the Heath wall alleging, one as to one feature, and another as to another, that some particular characteristic of the Heath wall is the natural and obvious way of accomplishing such a result. We submit that the Court of Appeals was right in saying: (Rec. Page 133). "In this device alone are the webs and voids of equal thickness and in perfect vertical alignment, thus forming a uniform series of voids extending horizontally throughout the entire length of the wall, and a perfectly aligned series of vertical webs, thereby securing a maximum amount of strength for a minimum of weight."

To this might be added that in this structure alone are the courses of uniform vertical depth, providing a horizontal mortar bed throughout the thickness of the wall, and in none of the references is found similar characteristics combining alternate overlapping or bonding of each course with that of the adjacent course, while still maintaining its desirable vertical alignment of webs, mortar joints and beds.

**In this connection it is important to remember that the Heath patent covers a wall and not a tile or some part of a wall.**

The testimony of the President of the Defendant Company in this case admits greater economy of manufacture, namely, by the use of a single die, and completing the wall with the greatest simplicity, which fits the statement of the Court of Appeals D. C. that

“the art is a narrow one, and any step which marks so decided an advance in strength, utility and economy of construction as that here disclosed, is entitled to recognition and protection. Not only does no reference cited anticipate appellant’s claims, but no combination of the references can be devised which will accomplish this end. It is no answer that the construction of walls from hollow blocks is old in the art. A new combination of old elements amounts to invention where it produces a new and useful result, although each old element may have been suggestive of the use which could be made of it in the new.

**Steiner & Voegtly Hardware Company vs. Tabor Sash Company**, 178 Fed. 831, (C. C. A. 2nd Cir). (Rec. Page 133-134).”

Even if it were doubtful as said in the last paragraph of that decision the Court says: “In the absence of proof to support the conclusion that it was obvious mechanical skill, the doubt should be resolved in favor of the appellant.” (Heath).

Here, it is submitted, there is extensive and cumulative evidence that it is not within the realm of mechanical skill. The assiduous efforts of the defendants in the former case at Portland, and in the case here, out of the years of experience of such witnesses as Denison and Johnson, fail to prove or even point out a single wall of this character prior to Heath’s invention.

If the conception of the Heath wall were so simple, were in the province of the ordinary mechanic, “**why then was it not struck upon before?**” The answer is very obvious. **Heath’s conception did involve real invention.** The Court of Appeals of the District of Columbia, considering the very art before this Court, has so held. We respectfully submit that the record in this present case strongly fortifies the legal presumption of

validity accompanying the granting of this patent, by the proven success and the welcome given it by "the big workaday world outside," and particularly by those who have been striving for years for just such an ideal wall.

We are not here seeking to interfere with the manufacture of any of these alleged prior uses, all these prior things may be practiced undisturbed so far as Heath's patent is concerned. We seek only to sustain this patent as covering the identical thing, the particular step forward which Mr. Heath has made in the building art.

After generations of use of more complicated methods of accomplishing the general results of a strong hollow wall construction, Mr. Heath has taken the last step which the Supreme Court has said in the law of patents is the step that wins. He has given the world something it had not had before. He is entitled to that reward which the laws provide and for which the constitution authorizes the granting of patents to promote the progress of science and useful arts.

Respectfully submitted,

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